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No.

In the Supreme Court of the United States

OCTOBER TERM, 1971

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

MIDWEST VIDEO CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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INDEX

CITATIONS

424

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The Solicitor General, on behalf of the United States and the Federal Communications Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case. The United States and the Commission believe that this case presents an important issue which ought to be resolved now by this Court. The United States has not, however, finally determined its position with respect to all aspects of the merits of the case. The views with respect to the merits expressed in this petition are those of the Commission.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra* pp. 15–29) is reported at 441 F. 2d 1322. The orders

of the Federal Communications Commission are reported at 20 F.C.C. 2d 201, 23 F.C.C. 2d 825, and 27 F.C.C. 2d 778 (Apps. C. D, and E, *infra*, pp. 31–67).

JURISDICTION

The judgment of the court of appeals was entered on May 13, 1971 (App. B, *infra*, p. 30). By order of Mr. Justice Blackmun the time within which to petition for certiorari was extended to October 9, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Communications Commission's rule requiring community antenna television systems with 3500 or more subscribers to originate programming is within the Commission's statutory authority.

STATUTE AND REGULATION INVOLVED

Sections 1, 2(a), 3(a), 3(b), 3(d), 4(i), 301, 303(g), 303(r), 307(b) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151, 152(a), 153(a), 153(b), 153(d), 154(i), 301, 303(g), 303(r), 307(b), are set forth in Appendix F, *infra*, pp. 68–72. The rule under review is also set forth in Appendix F, *infra*, p. 73.

STATEMENT

In *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, this Court held that community antenna television (CATV) systems engage in "interstate * * * communication by wire or radio" within the meaning of Section 2(a) of the Communications Act of 1934,

47 U.S.C. 152(a), and, consequently, that the Federal Communications Commission has regulatory jurisdiction over CATV, at least insofar as its regulation is "reasonably ancillary" to its regulation of the broadcast industry. Shortly thereafter the Commission launched a general inquiry "to explore the broad question of how best to obtain, consistent with the public interest standard of the Communications Act, the full benefits of developing communications technology for the public, with particular immediate reference to CATV technology and potential services * **." *Notice of Proposed Rulemaking and Notice of Inquiry*, 15 F.C.C. 2d 417; 33 Fed. Reg. 19028. In particular, the Commission requested comments on whether it should require CATV systems to originate programming, and, in addition, on whether advertising should be permitted and whether the concepts of "equal time", "fairness" and sponsorship identification, applicable to the broadcasting industry, ought to apply to CATV.[1]

On October 24, 1969, the Commission issued a report, 20 F.C.C. 2d 201; App. C, *infra*, pp. 31–56, dealing with the subject of program origination, or "cablecasting", by CATV systems. In this report, the Commission adopted a rule which provided that a CATV system having 3,500 or more subscribers[2] may not

[1] Other areas of inquiry included cross-ownership of television stations and CATV systems under common control, the use of some CATV channels to provide common carrier service, and importation of distant signals into major markets.

[2] In setting 3,500 subscribers as a feasible minimum size for systems required to originate programs, the Commission took into account record evidence on the estimated cost of con-

distribute the signals of television broadcast stations unless it also operates "to a significant extent as a local outlet by cablecasting" and by having available "facilities for local production and presentation of programs other than automated services" (App. C, *infra*, pp. 16–17).[3] The Commission had observed in its Notice of Rulemaking that the CATV industry was placing increased emphasis on program origination, including both local public service and entertainment programs, and on providing other nonbroadcast services to the public such as time, weather, and news reports and advertising.[4] On the basis of the comments submitted in

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structing and operating cablecasting systems of varying degrees of sophistication and the statistics of the industry which showed that 70% of the cablecasting systems currently originating programs had less than 3,500 subscribers and more than 50% of the originating systems had less than 2,000 subscribers. 20 F.C.C. 2d 201, 209–214 (App. C, *infra*, pp. 39–44).

[3] In addition, the Commission adopted rules which limit advertising messages to the beginning and end of each cablecast program and to natural breaks or intermissions within the program. Also regulations similar to those which the Communications Act and Commission rules make applicable to broadcasters were adopted with respect to cablecasts by candidates for public office, programs dealing with controversial issues of public importance and sponsorship identification of matter the system had been paid to cablecast (cf. 47 U.S.C. 315, 317).

[4] The Commission also referred to its earlier consideration of the subject in a recently completed CATV hearing involving the San Diego area. *Midwest Television, Inc.*, 13 F.C.C. 2d 478, affirmed *Midwest Television, Inc.* v. *F.C.C.*, 426 F. 2d 1222 (C.A.D.C.). In *Midwest* the Commission authorized a test of unrestricted program origination without commercials by CATV systems in the San Diego area, and conditioned the carriage "of broadcast signals by one system upon a requirement that it operates to a significant extent as an outlet for non-

the rule making proceeding the Commission concluded that CATV program origination serves the public interest by providing program diversity and creating outlets for self-expression, particularly in those areas where the establishment of broadcast stations has not proven feasible (20 F.C.C. 2d at 205–206, App. C, *infra*, pp. 35–36), and that the most effective way to encourage cablecasting would be to condition "where practicable, the carriage of broadcast signals upon a requirement for program origination" (*id.* at 208, App. C, *infra*, p. 38).[5]

Upon the challenge of respondent, an operator of CATV systems in Missouri, New Mexico, and Texas, the court of appeals set aside the program origination requirement on the ground that the Commission did not have the statutory authority to adopt it. Citing

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commercial community self-expression." 13 F.C.C. 2d at 510. The decision discussed at some length (*id.* at 503–508) the benefits to be gained from program origination, in particular the increase it would provide in the number of local outlets for community self-expression and for augmenting the public's choice of programs and types of service.

[5] "The use of broadcast signals," the Commission stated, "has enabled CATV to finance the construction of high capacity cable facilities. In requiring in return for these uses of radio that CATV devote a portion of the facilities to providing needed origination service, we are furthering our statutory responsibility to 'encourage the larger and more effective use of radio in the public interest' (47 U.S.C. 303(g)). The requirement will also facilitate the more effective performance of the Commission's duty to provide a fair, efficient, and equitable distribution of television service to each of the several States and communities (47 U.S.C. 307(b)), in areas where we have been unable to accomplish this through broadcast media." 20 F.C.C. at 208, App. C, *infra*, pp. 38–39.

Southwestern, supra, the court held that the cablecasting requirement was not "ancillary" to the Commission's responsibilities in the broadcast field and that therefore program origination by CATVs was beyond the scope of its jurisdiction. The court rejected the Commission's contention that the Communications Act was intended to confer unified jurisdiction and broad authority over all of the nation's wire and radio communication systems.[6] Judge Gibson concurred in the result, concluding that the Commission has the necessary authority over CATV to adopt the rule in question but that while the rule "is in the public interest, it does not appear that the FCC has shown a sufficient basis for exercising its authority at this time" (App. A, *infra*, p. 26–29).

REASONS FOR GRANTING THE WRIT

The Federal Communications Commission contends that the decision below is contrary to the underlying rationale of the Federal Communications Act of 1934, and is inconsistent with this Court's view of that Act as expressed in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157. If allowed to stand, the Commission believes that the decision will frustrate the Commission's efforts to integrate fully the rapidly expanding CATV industry into the nationwide communications system.

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[6] The court did not pass on the other rules relating to program origination (n. 3, *supra*), stating that since the petitioner could not be compelled to telecast, it lacked standing to challenge them.

1. Congress created the Federal Communications Commission in 1934 for the purpose of "centralizing authority heretofore granted by law to several agencies and * * * granting additional authority" in order to "make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities * * *." Section 1, 47 U.S.C. 151. The Commission's authority extends to "all interstate and foreign communication by wire or radio" and "to all persons engaged within the United States in such communication." Section 2(a), 47 U.S.C. 152(a).

The scheme of regulation created by the Act is not, as the decision below implies, restricted to forms of wire and radio communication in use at the time the Act was passed; rather, the Act was also designed to meet new developments in the continuously evolving uses of wire and radio. With respect to both technological and economic regulation the Commission is given comprehensive powers "to promote and realize the vast potentialities of radio." *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 217; see *United States* v. *Storer Broadcasting Co.,* 351 U.S. 192, 203; *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 138. Thus, with respect to the Commission's rule making powers, Section 4(i), 47 U.S.C. 154(i), contains a broad grant of authority to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the

execution of its functions."[7] These rulemaking powers are "coterminous with the scope of agency regulation * * *." *American Trucking Assns* v. *United States*, 344 U.S. 298, 311; see *id.* at 309–311.

In *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, this Court indicated that the Communications Act confers on the Commission essentially the same jurisdiction over CATV that it has over the broadcasting industry. Rejecting the contention that the Act "limits the Commission's authority to those activities and forms of communication that are specifically described by the Act's other provisions," 392 U.S. at 172, the Court emphasized Congress' intention that all branches of the wire or radio communications industry be subject to a unified regulatory system:

> We cannot construe the Act so restrictively. Nothing in the language of § 152(a), in the surrounding language, or in the Act's history or purposes limits the Commission's authority to those activities and forms of communication that are specifically described by the Act's other provisions. The section itself states merely that the "provisions of [the Act] shall apply to all interstate and foreign communication by wire or radio * * *." Similiarly, the legislative history indicates that the Commission was given "regulatory power over all forms of electrical com-

[7] Section 303(r), 47 U.S.C. 303(r), similarly grants authority "[e]xcept as otherwise provided in this Act * * * from time to time, as public convenience, interest, or necessity requires * * *" to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act * * *.

munication * * *." S. Rep. No. 781, 73d Cong., 2d Sess., 1. Certainly Congress could not in 1934 have foreseen the development of community antenna television systems, but it seems to us that it was precisely because Congress wished "to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission," *F.C.C.* v. *Pottsville Broadcasting Co., supra,* at 138, that it conferred upon the Commission a "unified jurisdiction"[8] and "broad authority."[9] Thus, "[u]nderlying the whole [Communications Act] is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors * * *." [392 U.S. at 172–173; footnotes renumbered.]

To be sure, the Court's opinion also noted that the Court was not required in *Southwestern* to decide the full scope of the Commission's regulatory jurisdiction over CATV, but merely whether the Commission had jurisdiction to regulate CATV in ways which are "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." 392 U.S. at 178. Relying upon this cautionary language, the court of appeals seems to have concluded that the Commission's regulations in the CATV area must be designed only to prevent harmful competitive effects on the broadcast industry. Such a narrow reading of *Southwest-*

[8] "S. Rep. No. 781, *supra*, at 1" (footnote by the Court).

[9] "H.R. Rep. No. 1850, *supra*, at 1" (footnote by the Court).

ern is unjustified. In the portion of its opinion quoted above, this Court strongly suggested that the Commission's regulatory jurisdiction over CATV is similar to its jurisdiction over other major segments of the communications industry.

In any event, even if Commission regulation of CATV must be "reasonably ancillary" to regulation of broadcasting, there is no reason to believe that this standard would restrict the Commission to regulation designed to prevent deleterious competition to the broadcasting industry. The CATV industry is dependent for its existence upon the broadcast signals that it picks up and transmits. Having become "an integral part of interstate broadcast transmission," CATV operators "cannot have the economic benefits of such carriage as they perform and be free of the necessarily pervasive jurisdiction of the Commission." *General Telephone Co. of California* v. *Federal Communications Commission*, 413 F. 2d 390, 401 (C.A.D.C.) (per Burger, J.), certiorari denied, 396 U.S. 888; see also *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266; *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.* 365 U.S. 1, 7; *Carter Mountain Transmission Corp.* v. *Federal Communications Commission*, 321 F. 2d 359 (C.A.D.C.), certiorari denied, 375 U.S. 951. Thus, even if there must be some connection between the Commission's regulation of CATV and its responsibilities in the broadcasting area, such a connection is present, when, as here, the Commission attempts to require CATV operators, whose principal product

is the retransmission of broadcast signals and who serve the same functions in many areas as broadcasters, to meet some of the same basic standards of responsibility to the public that are imposed on broadcasters.

Indeed, though the court below referred to the "reasonably ancillary" language of the *Southwestern* case, most of the majority opinion deals with the court's view of the wisdom of the program origination requirement, which it considered economically burdensome to cablecasters.[10] This factor, of course, bears not upon the Commission's jurisdiction, but upon the reasonableness of the regulation. The Commission does not contend that its authority to regulate CATV is exempt from the requirement of reasonableness, and it recognizes that the question of the reasonableness of regulation in the CATV area might in some situations depend upon factors different from those present in the regulation of the broadcasting industry. We submit, however, that the restriction by the court below of the Commission's *jurisdiction* to regulate the

[10] The record before the Commission, however, does not support this conclusion. In considering the financial impairment contentions of the parties, the Commission noted that the record contained "no data tending to demonstrate that systems with 3,500 subscribers cannot cablecast without impairing their financial stability * * *." The Commission pointed out that 70% of the systems already originating programs had fewer than 3,500 subscribers. Moreover, the court failed to consider either the available data on costs before the Commission or the fact that the cablecasting requirement is very flexible (23 F.C.C. 2d at 826–827) and includes specific guidelines for waiver of the requirement if cablecasting would in fact be financially injurious to a system. 27 F.C.C. 778, 779–780.

operation of CATV systems is contrary to Congress' intention, recognized by this Court, to establish a unified system of regulation of the "radio and wire" communications industry. Indeed, lack of Commission jurisdiction in this field would presumably open the door to disparate state and local regulation of CATV services in contravention of the objectives of uniform and integrated regulation which Congress sought to achieve. Cf. *General Telephone Co. of California* v. *Federal Communications Commission, supra*, 413 F.2d at 402.

2. There are now more than 2,500 CATV systems in operation (*Television Factbook*, 1971–1972, Services Volume, p. 18a) servicing an estimated 15 to 20 million viewers per day. In addition there are more than 2,000 CATV franchises outstanding which are not currently operating, and approximately 2,600 franchise applications pending. *Addena to Television Factbook*, Vol. 11–40, October 4, 1971. While the growth of CATV is still accelerating, its enormous potential as a communication service to the public is now in clear enough focus to underscore the need for unified regulation which will integrate CATV into the existing nation-wide communication service. The alternative to Commission regulation is the kind of fragmented regulatory pattern and chaotic development which characterized broadcasting in its early years and which led to the enactment of the Communications Act of 1934. See *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 211–214. Although CATV itself had not yet been developed and was not specifically considered

by Congress at that time, it was the purpose of the Communications Act to confer sufficient authority on the Commission to prevent this kind of chaos from occurring again in the communications field.

Indeed, the cablecasting rule is part of a comprehensive regulatory program which the Commission is developing to integrate cable television into the nation's communications system. Under active consideration, though not yet adopted in the form of rules, are a number of related proposals which seek to utilize the high capacity cable facilities of CATV to provide a diversity of public services beyond that provided by the retransmission of broadcast signals, such as two-way non-voice communication, leased channels, public access channels, educational channels, and others.[11] The restrictive view of the Commission's jurisdiction reflected in the decision below casts serious doubt on this entire program. The case thus presents a question of great importance to the administration of the Communications Act and to the future development of the communications industry.

CONCLUSION

While, as previously noted (*supra*, p. 1), the views on the merits expressed herein are those of the Commission, both the United States and the Commission

[11] A full statement of the Commission's "proposals for the near-term regulation of cable television" was submitted on August 5, 1971, to appropriate committees of the House and Senate and appears at 117 Cong. Rec. S. 13628 (daily ed. August 6, 1971) and 31 F.C.C. 2d 115.

join in urging that the case is an important one, which should be reviewed by this Court. The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1971.

APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 20,439.

Midwest Video Corporation,
Petitioner,
v.
United States of America and Federal Communications Commission,
Respondents.

On Petition for Review of Orders of the Federal Communications Commission.

[May 13, 1971.]

Before VAN OOSTERHOUT, GIBSON and LAY, Circuit Judges.

VAN OOSTERHOUT, Circuit Judge.

Petitioner, Midwest Video Corporation, seeks review of the first report and order adopted by the Federal Communications Commission (FCC) on October 24, 1969, reported at 20 F.C.C. 2d 201, and its order denying reconsideration adopted June 24, 1970, reported at 23 F.C.C. 2d 825. The foundation for such orders was laid by notice of proposed rule making and notice of inquiry reported at

15 F.C.C. 2d 417 relating to community antenna television systems (CATV).

Petitioner operates CATV systems in Missouri, New Mexico and Texas. Some of its systems have microwave authorization and some systems have more than 3500 subscribers. Petitioner was substantially engaged in its CATV operations long prior to the institution of the rule making proceedings here involved.

The FCC, asserting authority to do so pursuant to the Communications Act of 1934 as amended, 47 U.S.C.A. § 151 et seq., adopted: (1) Rules requiring all CATV systems with 3500 or more subscribers to produce original programs to a significant extent and to have available facilities for the production of such programs after April 1, 1971, as a condition to its right to continue to function as a CATV system. (2) Rules limiting type of programs which CATV systems may transmit upon the basis of a program of per channel charge. (3) Rules governing the program origination of all CATV systems.

Petitioner contends that Congress has not by the Communications Act or otherwise authorized the FCC to prescribe such rules. We agree with the petitioner's contention and set aside the origination rule for the reasons hereinafter stated.

The principal attack is upon the origination rule referred to at item (1) above. Section 74.1111 of the Commission's rules so far as here material reads:

> "(a) Effective on and after April 1, 1971, no CATV system having 3,500 or more subscribers shall carry the signal of any television broadcast station unless the system also operates to a significant extent as a local outlet by cablecasting and has available facilities

for local production and presentation of programs other than automated services. . . . ."

Cable casting is thus defined in § 74.1101:

"(j) *Cablecasting.* The term 'cablecasting' means programing distributed on a CATV system which has been originated by the CATV operator or by another entity, exclusive of broadcast signals carried on the system."

No direct authority is granted to the FCC by the Communications Act to regulate CATV systems. CATV came into existence subsequent to the enactment of the Communications Act of 1934. Consequently it is not surprising that nothing can be found in the Act or its legislative history bearing upon the intention of Congress with respect to CATV regulation. Many efforts to enact legislation covering CATV have failed to meet with success. The growth of CATV has been explosive. Courts have found the issue of the right of the FCC to regulate CATV to be extremely troublesome. The concern is not over the power of Congress to regulate CATV but over the authorization Congress has actually made.

Descriptions of CATV systems covering both off-the-air and microwave fed types, the function of CATV and the pertinent history of its development are fully discussed in the FCC reports and in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, and *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390. See *Black Hills Video Corp.* v. *F.C.C.*, 8 Cir., 399 F.2d 65. No need exists to re-cover this ground here.

CATV operations are of two types, off-the-air and microwave. Off-the-air systems capture television and radio signals off the air by means of a high antenna con-

vert or modify the signal by electronic equipment and carry the converted signal to subscribers for a fee by coaxial cable and wire. Microwave systems use amplifying devices to bring distant signals over the air to the receiving end of its station from which it conveys the signal to customers in the same manner as off-the-air systems. The FCC first asserted jurisdiction over microwave fed systems and later asserted jurisdiction over off-the-air systems. The courts appear to attach no significance to the distinctions between off-the-air microwave fed systems. See *Southwestern Cable Co.*, supra, p. 167 of 392 U.S.

In any event, the authority of the FCC in our present case does not appear to turn on the competing use of the spectrum by microwave fed operations. The rules are applied in the same manner to both off-the-air and the microwave operations.

In *Southwestern Cable Co.*, the Supreme Court upheld the right of the FCC to require CATV systems to carry signals of local television stations, the nonduplication of local programing and the restriction of CATV transmission of distant signals into the one-hundred largest television markets (except for such services as existed on February 15, 1966).

Such authority was predicated upon 47 U.S.C.A. § 152 (a) making the provisions of the Act applicable to "interstate or foreign communication by wire or radio" and the broad statements of purposes in 47 U.S.C.A. § 151 directing the FCC to "make available . . . to all the people of the United States a rapid, efficient, Nationwide wire and radio communication service. . . ." Reliance is also placed on § 153(a) and (b) defining wire and radio communications, and §§ 307(b) and 303(f) relating to providing equitable allocations of broadcasting facilities.

The Court in *Southwestern Cable* by way of limitation states:

> "There is no need here to determine in detail the limits of the Commission's authority to regulate CATV. It is enough to emphasize that the authority which we recognize today under §152(a) is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting. The Commission may, for these purposes, issue 'such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law,' as 'public convenience, interest, or necessity requires.' 47 U.S.C. §303(r). We express no views as to the Commission's authority, if any, to regulate CATV under any other circumstances or for any other purposes." 392 U.S. 157, 178.

The compulsory origination rule here goes far beyond the regulatory power approved in *Southwestern Cable Co.* The traditional CATV operation differs greatly from that of originating programs. For origination, substantial investment in entirely new and different equipment is required. Additional personnel is needed for program origination. The record, as the Commission impliedly concedes, provides no accurate estimate of the increased cost that would be involved. See paragraph 25 of the first report.

The Commission recognizes that smaller CATV operations could not afford to provide origination services and concedes that there is no consensus as to the appropriate cutoff point or ability to provide origination. The Commission then arbitrarily adopts 3500 subscribers as the cutoff point.

In paragraph 24 of the first report, the Commission cites instances where CATVs with more than 3500 sub-

scribers have lost money on origination. Only approximately 10% of the existing CATV operations now have more than 3500 subscribers. At paragraph 4 of its first report, 20 F.C.C. 2d p. 20, the Commission states:

> "4. Those commenting on behalf of CATV interests generally agreed that CATV program origination serves public interest and should be encouraged, though they almost uniformly opposed our proposal to require origination as a condition for the carriage of broadcast signals (notice, pars. 15-16). On the other hand, broadcast interests—particularly those without CATV holdings—generally urged that program origination should be prohibited altogether, or at least restricted to local originations of the public service type, and that advertising should be barred. It is claimed that this is necessary to prevent potential fractionalization of the audience for broadcast services and a siphoning off of program material and advertising revenue now available to the broadcast service."

Thus it appears that both the CATV interests and conventional broadcasters are opposed to compulsory CATV origination.

In *Fortnightly*, the Supreme Court states that television results from the combined activity of broadcasters and viewers. After carefully analyzing the function of CATV, the Court holds that the CATV operation falls on the viewers' side of the line, and then goes on to say:

> "Essentially, a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals; it provides a well-located antenna with an efficient connection to the viewer's set. It is true that a CATV system plays an 'active' role in making reception possible in a given area, but so do ordinary television sets and antennas. CATV equipment is

powerful and sophisticated, but the basic function the equipment serves is little different from that served by the equipment generally furnished by a television viewer. If an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be 'performing' the programs he received on his television set. The result would be no different if several people combined to erect a cooperative antenna for the same purpose. The only difference in the case of CATV is that the antenna system is erected and owned not by its users but by an entrepreneur.

"The function of CATV systems has little in common with the function of broadcasters. CATV systems do not in fact broadcast or rebroadcast. Broadcasters select the programs to be viewed; CATV systems simply carry, without editing, whatever programs they receive. Broadcasters procure programs and propagate them to the public; CATV systems receive programs that have been released to the public and carry them by private channels to additional viewers. We hold that CATV operators, like viewers and unlike broadcasters, do not perform the programs that they receive and carry.' 392 U.S. 390, 399-401.

The Court went on to hold that CATV operators, like viewers, did not perform programs and hence incurred no obligation under copyright law.

The *Fortnightly* Court also recognizes the useful public service performed by CATV in making television reception possible in certain areas.

The *Fortnightly* holding that the CATV operator is not a broadcaster and that the operation falls on the viewers' side of the line affords strong support for the petitioner's contention that the Communications Act does not authorize the FCC to compel program origination.

We find no balance of public interest which requires stretching the Act to confer such authority. In so holding, we are not passing on the power of the FCC to permit CATVs to originate programs and to prescribe reasonable rules for such CATV operators who voluntarily choose to originate programs.

It is of some significance that Congress has not authorized the FCC to license CATV operation and that the Commission has not assumed authority to do so. In its order denying rehearing, it states:

> "7. We note also other requests by several parties that we deal with CATV on a more comprehensive basis at this time, covering such issues as licensing, whether origination by the CATV operator should be permitted on more than one channel, regulation of common carrier operations, reporting requirements, and technical standards. We are not persuaded that all of these questions need be resolved before we proceed with the basic determinations made in the First Report and Order of October 27, 1969. CATV originations are still in their infancy and, so far as we know, common carrier operations are still in the future. These various issues are not being forgotten." 23 F.C.C.2d, 829.

CATV operators obtain their licenses or franchises from state regulatory boards or municipalities. Congress has made no attempt by legislation to preempt such authority. The Commission has not asserted a right to license CATV operators. Problems arise with respect to encroachment on state and municipal rights to franchise CATV. The record affords no basis for determining whether the local franchises granted to CATV operators include or exclude the right to cablecast. In sharp contrast, Congress has preempted the field of licensing radio and television opera-

tors. Provisions with respect to periods for which licenses may be issued and standards to be applied in granting licenses are spelled out in the statute.

It is established that cablecasting involves no use of the spectrum. Cablecasting involves a new and distinct use of electronic communication which does not utilize in any way the radio frequency spectrum of the broadcast signals regulated by the Commission. The Commission's power to adopt rules requiring cablecasting to the extent that it exists must be based on the Commission's right to adopt rules that are reasonably ancillary to its responsibilities in the broadcasting field. Cablecasting's link to television is primarily economic. As held in *Fortnightly*, broadcast signals are dedicated to the public by broadcast studios and the right to receive and distribute them may be exercised by any one with capacity to capture the signals.

The Communications Act confers no authority to the Commission to favor one mode of electronic communication over another.

As stated by the United States in its brief, the public interest standard of the Communications Act incorporates the basic national policy in favor of competition as expressed by the antitrust laws in areas such as this where the competition does not relate to the use of the radio frequency spectrum.

In our view, the Commission's origination requirement goes far beyond the regulation of the use made of signals captured by CATV as authorized in *Southwestern Cable Co.* Petitioner is required as a condition to its right to use the captured signals in their existing franchise operation to engage in the entirely new and different business

of originating programs. Entering into the program origination field involves very substantial expenditures. Costly equipment must be purchased. Personnel must be employed who are skilled in photography, sound production, program planning and direction, and in performing. Such expense will often prove burdensome because of the limited area the program will reach. See Federal Regulation of Cable Television: The Visible Hand, Chazen and Ross, 83 Harvard L. Rev. 1820.

A high probability exists that cablecasting will not be self-supporting and that the burden thereof would likely cause substantial increase in the amount that subscribers are required to pay for CATV service and in some instances may drive the CATV operators out of business.

In *Frost & Frost Trucking Co.* v. *Railroad Commission*, 271 U.S. 583, the Court held that the State had a right for proper reasons to grant or withhold from its citizens the right to use its highways for private purposes, but that the State could not condition the grant of such right upon the user becoming a common carrier. The Court said:

> "Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition, which the carrier is free to accept or reject. In reality, the carrier is given no choice, except a choice between the rock and the whirlpool,—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden.
>
> "It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the

state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights.". 271 U.S. 583, 593-94.

See *Interstate Commerce Commission* v. *Oregon-Washington R. Co.*, 288 U.S. 14; *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 10 Cir., 100 F.2d 770, reversed on other grounds, 309 U.S. 4. Such principle applies to our present situation.

FCC's reliance upon the end use theory set out in *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, is misplaced. The Court there held that FPC could consider the end use of the gas in exercising its jurisdiction over gas transmission but then goes on to say: "The Commission cannot order a natural gas company to sell gas to users that it favors; it can only exercise a veto power over proposed transportation and it can only do this when a balance of all the circumstances weights against certification." 365 U.S. 1, 17.

In *Southwestern Cable Co.*, the FCC took the position that the regulations imposed were necessary to prevent deleterious competition by CATVs which would financially cripple conventional licensed broadcasters and discourage prospective broadcasters, and that such regulation hence was in the public interest. The FCC has now changed its position and holds the public interest requires CATV origination because broadcasters in some areas will not provide adequate service. Competition with conventional television operators is encouraged by requiring cablecasting and permitting advertising with certain limitations, all over the strong protest of licensed broadcasters. The Commission report itself shows that upon the basis of the record made, it is highly speculative whether there is

sufficient expertise or information available to support a finding that the origination rule will further the public interest. There is a distinct possibility that such requirement may force CATV operators out of business thereby making unavailable the recognized useful service performed by CATVs in areas where distance and topography impair favorable reception of television signals.

We hold that the FCC is without authority to impose the program originating rule on existing cable television operators.

Petitioner has also challenged the pay TV rules relating to program origination and the rules governing program origination. Petitioner has stated that it has no intention or desire to cablecast. Since we have held that petitioner cannot be compelled to cablecast, it would appear that petitioner has no standing to challenge such rules. Moreover, some rules are still before the Commission on petitions for reconsideration filed by other parties. Under such circumstances, we pretermit consideration of the validity of the rules promulgated with respect to CATV operators who voluntarily elect to cablecast.

The order of the FCC requiring CATV operators to originate programs as a condition to the continuation of their CATV operations is set aside.

GIBSON, Circuit Judge, concurring.

I concur in the result. I think the FCC has authority over CATV systems but that the order under review is confiscatory and hence arbitrary.

It is certainly in the public interest for the FCC to regulate CATV systems which partake of a monopoly in

disseminating and transmitting TV programs in certain areas. Undoubtedly their operations have a substantial effect on licensed broadcasters; and from the public viewpoint they provide a real service in offering the public a wide variety of programs with improved reception. Whether they do this with less annoying and irritating commercials I do not know. It appears to the casual viewer that the commercials have over the years become increasingly longer in length, more frequent and sometimes louder so that some news programs and some motion picture programs amount to little more than a series of disjointed commercials. It is thus uncertain whether the CATV systems would give the public any relief from the ever-increasing commercials; and, of course, if the CATV systems were allowed to inject their own commercials, this would constitute an additional irritation and legal trespass upon the viewers' time. This, however, is a matter that must await future development.

Southwestern Cable recognized the CATV systems' impact on TV broadcasting and clearly upheld the Commission's authority to meet the issue in that case, while noting that the extent of the Commission's authority had not yet been judicially determined. Congress, of course, could set out the limits but has not seen fit to do so and for a variety of reasons might not act upon the problem. The FCC, therefore, will have to regulate the development of this new and important electronic development in a manner best suited to the public interest, as the need arises and the opportunity presents itself.

The *Fortnightly* case of course only considered the CATV systems as they are now constituted as a disseminator and viewer of programs rather than an originator or broadcaster. In this light CATV does not violate

the Copyright Act of 1909. The only import of this decision is that it does definitely classify the CATV systems as transmission facilities rather than broadcasting facilities. Now the FCC, by imposing originating responsibility of even a limited type on certain CATV systems, changes their essential operation from that of a pure transmission facility to that of at least a limited broadcast facility. Then once assuming a broadcast function, the CATV systems would have to be further regulated in the public interest by the FCC; and of course local origination in the CATV systems could eventually open up many avenues for mass media communication. There is, and the majority opinion does not rule out, the possibility that optional or voluntary compliance with the FCC order might take place.

While it appears to me that the FCC's rule on limited origination is in the public interest, it does not appear that the FCC has shown a sufficient basis for exercising its authority at this time. The Commission does have broad authority under 47 U.S.C. § 151, "to make available * * * a rapid, efficient, Nation-wide * * * communication service with adequate facilities at reasonable charges"; but the Commission's particular order on origination, at this time at least, would be extremely burdensome and perhaps remove from the CATV field many entrepreneurs who do not have the resources, talent and ability to enter the broadcasting field. The order is thus oppressive and arbitrary at this time, but that does not mean that with the continued development of the CATV systems and with the systems' impact upon broadcasting, it might not in the future be advisable and in the public interest to compel origination of local programs. It would appear to me that the CATV systems should be permitted

to remain basically a transmission facility at this time, with allowance for the CATV systems to experiment on origination without being compelled to do so.

Another difficulty is in now assessing future development of the CATV systems' operation. The FCC is to be commended in attempting to anticipate how this electronic phenomenon can and should be used in the public interest. This can be done by allowing experimentation with voluntary origination without placing a burden that to some would be confiscatory.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

JUDGMENT

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 20439.

Midwest Video Corporation, Petitioner, v. United States of America and Federal Communications Commission, Respondent.	On Petition for Review of Orders of the Federal Communications Commission.

[September Term, 1970]

On Consideration Whereof, it is now here ordered and adjudged by this Court that the order of the Federal Communications Commission in this cause requiring CATV operators to originate programs as a condition to the continuation of their CATV operations be and is hereby, set aside in accordance with the majority opinion of this Court this day filed herein.

May 13, 1971.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX C

F.C.C. 69–1170

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 74, SUBPART K, OF THE COMMISSION'S RULES AND REGULATIONS RELATIVE TO COMMUNITY ANTENNA TELEVISION SYSTEMS; AND INQUIRY INTO THE DEVELOPMENT OF COMMUNICATIONS TECHNOLOGY AND SERVICES TO FORMULATE REGULATORY POLICY AND RULEMAKING AND/OR LEGISLATIVE PROPOSALS	Docket No. 18397

FIRST REPORT AND ORDER

(Adopted October 24, 1969)

BY THE COMMISSION: COMMISSIONER BARTLEY CONCURRING AND ISSUING A STATEMENT; COMMISSIONER ROBERT E. LEE DISSENTING AND ISSUING A STATEMENT; COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. The Commission's "Notice of Proposed Rulemaking" and "Notice of Inquiry," issued on December 13, 1968 (15 F.C.C. 2d 417, 33 Fed. Reg. 19028), divided this proceeding into five parts. Under that notice and subsequent orders, the filing times for comments and reply comments on various parts, or portions thereof, were scheduled for different dates. Comments and reply comments on paragraphs 11–20 and 23–25 of part III of the December 13th notice have been received and considered by the Commission. This first report and order treats only some of the matters involved in those paragraphs, i.e., CATV program origination, its economic basis and the proposed equal time, sponsorship identification, and fairness requirements.

2. In this connection, we wish to emphasize that in this complex rulemaking proceeding, it would be wholly impracticable to attempt to issue a comprehensive set of rules governing all aspects. Rather, we shall split off parts for action, deferring action on other parts pending further analysis or further proceedings. Thus, while we act here on CATV origination, whether it should be required, whether commercials should be allowed, and certain basic requirements such as equal opportunities for political candidates, fairness, and sponsorship identification, we have not acted on the related diversification issues. Clearly, with origination, there should be multiple ownership rules, particularly with respect to cross-ownership of broadcasting and CATV facilities in the same area. But since the diversification issues require lengthier analysis and study, we act now, as we can, in the above-noted areas. For, it is, we think, of the utmost importance that

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we supply needed guidance to the industries involved, to State and municipal entities, and to other interested persons, as to the Federal regulatory policies in this vital area. Moreover, we note that Congress is considering legislation in this area. While the legislation is believed to be aimed essentially at resolving the unfair competition issues treated in part IV of the notice, our policies in the origination area (pt. III) may also be relevant to the Congress in its consideration of the above-noted legislation. We think it desirable, therefore, that Congress be fully informed of these policies, so that it may take them into account, either as appropriate background to the legislation or as matters to be included in the legislation. We state, as we have before, that in this important new area we welcome congressional review and whatever guidance Congress may wish to afford.

I. CATV PROGRAM ORIGINATION IN GENERAL

3. In paragraphs 12–14 of the notice the Commission set forth its tentative view that CATV program origination is in the public interest and should be encouraged. We further stated our belief (pars. 12, 26) that the public interest would be served by encouraging CATV systems to operate as common carriers on some channels in order to afford an outlet for others to present programs of their own choosing, free from any control of the CATV operator as to content (except as required by the Commission's rules or applicable law), and to provide other communications services. These tentative conclusions recognize the great potential of the cable technology to further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services (notice, pars. 5, 13). They also reflect our view that a multipurpose CATV operation combining carriage of broadcast signals with program origination and common carrier srevices, might best exploit cable channel capacity to the advantage of the public and promote the basic purpose for which this Commission was created: "regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all people of the United States a rapid, efficient, nationwide, and worldwide wire and radio communication service with adequate facilities at reasonable charges * * *" (sec. 1 of the Communications Act). After full consideration of the comments filed by the parties, we adhere to the view that program origination on CATV is in the public interest.

4. Those commenting on behalf of CATV interests generally agreed that CATV program origination serves public interest and should be encouraged, though they almost uniformly opposed our proposal to require origination as a condition for the carriage of broadcast signals (notice, pars. 15–16). On the other hand, broadcast interests—particularly those without CATV holdings—generally urged that program origination should be prohibited altogether, or at least restricted to local originations of the public service type, and that advertising should be barred. It is claimed that this is necessary to prevent potential fractionalization of the audience for broadcast services and a siphoning off of program material and advertising revenue now available to the broadcast service.

5. We are not persuaded that the position of the broadcasters has merit. In the first place, if the public is to be provided with additional program choices and different types of services and chooses to take advantage of them, it appears inevitable that there may be less viewing of the previously existing services.[1] However, we do not think that the public should be deprived of an opportunity for greater diversity merely because a broadening of selections may spread the audience and reduce the size of the audience for any particular selection. Such competition for audience attention is not unfair, since broadcasters and CATV originators (both the CATV operator and others originating on common carrier channels), stand on the same footing in acquiring the program material with which they compete.

6. Second, a loss of audience or advertising revenue to a television station is not in itself a matter of moment to the public interest unless the result is a net loss of television service. *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 475–476; *Carroll Broadcasting Co.* v. *Federal Communications Commission*, 258 F. 2d 440 (C.A.D.C.). The Commission has repeatedly recognized, of course, that a CATV-caused loss or deterioration of free broadcast service would be detrimental to the public interest since it does not presently appear that CATV could replace such service for viewers not economically reached by cable or those unable to afford CATV charges. However, despite much speculation in the comments, we find no factual basis in this record or other persuasive reason for concluding that CATV origination is likely to cause such a loss in the near future (i.e., the next decade).[2]

7. Contrary to the misconception in some of the comments, the December 13 notice did not propose to restrict CATV to local originations or to bar originations of the entertainment type or to preclude CATV network operations on an interconnected basis, and our finding as to absence of any real basis for the asserted fears of the broadcasters is not based on any restrictions of this nature. While we regard augmented opportunities for community self-expression as extremely important, the Commission has also sought to promote new national and regional television networks generally and intends actively to explore this possibility for CATV (see e.g., notice, footnote 8 and par. 60). Our experience in the broadcast field (both commercial and noncommercial), as well as comments filed in this proceeding, leads us to believe that the successful inauguration of any new network is not an easy matter, to a significant extent because of the high cost and other difficulties in producing or otherwise procuring programing in sufficient quantity and quality for network operations.[3] Moreover, CATV faces an additional hurdle in that its present subscriber base, while affording fees not available to broadcasters, is nevertheless far smaller than the potential audience open to a new broadcast network. This situation might change substantially if CATV systems commenced

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[1] It is possible, of course, that some of the viewers of the new services may be persons who either did not watch the old services or who increase their viewing hours in light of the added diversity. To that extent, CATV program origination may not affect the audience previously available to the broadcast service.

[2] The above statement is to be contrasted with the views expressed in *Midwest Television, Inc.*, 13 F.C.C. 2d 478, and pt. IV of the Dec. 13 notice herein as to CATV operations with distant signals in major markets under present circumstances.

[3] Another very important factor in the broadcast field is the present lack of competitively equal outlets in many markets.

operations in major population centers, achieved high penetration percentages, and found ways to expand their service to outlying areas through microwave or other technological means. However, we think that in any event it would be a substantial period of time before any CATV network is in a position generally to outbid the broadcast service for the programing now presented by that service or to siphon off audience and advertising revenue to a degree that might have detrimental impact on established broadcast service to the public. See also, here, the discussion in paragraphs 9–10, infra.

8. Third, and most important, in the event that adverse consequences on service by individual stations or broadcast networks should develop or appear imminent, the Commission can and would take such remedial or preventative action as may be necessary to preserve service to the public. As stated in the notice (par. 14), "the Commission's authority to regulate the use of broadcast signals as a base for CATV program origination encompasses power to adopt regulations reasonably designed to prevent such operations from having detrimental consequences to the public interest and to promote their development along lines likely to maximize the potential benefits to the public." We intend to keep a watchful eye on the progress and impact of CATV origination and will be alert to protect the public against any significant overall loss or impairment of television service.

9. In the field of broadcast subscription television, we have already adopted certain measures designed to avoid any adverse impact on free broadcast service. *Subscription Television*, 15 F.C.C. 2d 466, 504–509. The Commission clearly has the authority, we believe, to impose similar or other appropriate safeguards for CATV origination. We believe that we should leave this an open matter, for further consideration (if the need arises) either at some later date in this rulemaking proceeding or in another rulemaking proceeding, to be commenced after we gain some further experience in this area.

10. We shall expand briefly on our reasons for now treating over-the-air and wire pay-TV differently. First, we note that, in the former field, we have data from the Hartford trial. We recognize the potential of the over-the-air pay-TV service, with its ability to reach large numbers of persons throughout the station's service area, and to obtain revenues on a per program basis. The development of pay-TV on CATV systems is much more difficult to foresee at this time. There has been no comparable experiment or test of a substantial nature. The large community remains to be wired, from almost a zero starting point. We have not authorized the use of distant signals without payment as a base for CATV operations in the larger markets. We are reluctant to take any further action which might inhibit cable development in these markets, unless and until experience gives some indication of a trend calling for action in the public interest. It may be that CATV systems, while originating some programing of types which might be found on free television, would not obtain such revenues that—taking into account its penetration in these markets [4]—there would be any significant diminution of fare presently available free

[4] We note that, unlike operation with distant signals (see notice, pars. 34, 36), we have no present indication of the degree of penetration CATV, operating with originations but no distant signals, might achieve in these large markets. This, however, is a significant factor to be included in the public interest judgment discussed above.

to the American public. Finally, we do impose one restriction on CATV designed, in part, to insure that the public will receive, to some significant extent, a different service; namely, that the programing originated on cable cannot be interrupted by commercials (i.e., commercials permissible only at natural breaks). See discussion, infra, paragraphs 31–38. In short, it appears to us that wire origination operations in the larger markets may face different, and perhaps more difficult, problems than over-the-air pay-TV; that we lack any present substantial experience in this respect in the wire area; and that, therefore, the public interest would be best served for the present by encouraging CATV to experiment and develop its originations free from restriction as to interconnection or limitations as to types of programing, in the expectation that the end result will be significant added diversity for the public. We stress again that this is simply our conclusion as to how best to proceed at this initial stage, and that as we gain experience, we can take such action as may be required in the public interest.

11. We also deem it appropriate at this time to amplify our view that CATV systems should be encouraged, and perhaps ultimately required, to lease cable space to others for originations of their own choice on a local or interconnected basis, in order to promote diversity of control over the media of communication and diversity of program choices as well as to increase the opportunities for television communication with the public by more widespread sources. We adopt no rules at this time, since this is an area which we believe requires further study and analysis of the comments.

12. The most marked potential of the cable technology for enhancing communications services to the public stems from its expanding channel capacity. CATV cable started with five channels or less, now generally has 12, and holds promise of 20–40 or more. From a diversity standpoint, it seems beyond dispute that one party should not control the content of communications on so many channels into the home. For, it has long been a basic tenet of national communications policy that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press* v. *United States*, 326 U.S. 1, 20; *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission*, 395 U.S. 367; *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192; *The Goodwill Stations, Inc.* v. *Federal Communications Commission*, 325 F. 2d 637, 640 at footnote 5; *First Report and Order in Dockets Nos. 14895 and 15233*, 38 F.C.C. 683, 699–700.

13. In one sense, as pointed out in the comments, traditional CATV operations further the goal of diversity simply by carrying multiple broadcast signals. While CATV operators select the signals carried (within the confines of the applicable Commission rules), they generally have no control over the content of the communications on the signals selected.[5] However, the principle of diversity encompasses more than diversity of control; it includes also the important factor of

[5] This kind of diversity is diminished if the CATV operator has an ownership interest in broadcast stations carried on the system, or if he "programs" a channel by selecting programs from a number of distant stations. In such cases, he is no longer a passive conduit for program services designed by others.

diversity of program choices available to the public. As reflected in our proposal to require CATV program origination as a condition for the carriage of broadcast signals, we do not think, given the present broadcast mode of operations, that significant additional program choice can be obtained by simply adding more broadcast signals to provide 20–40 channels of programing to subscribers. There are only three national television networks and a large percentage of our broadcast stations are affiliated with these networks. While network-affiliated stations also present nonnetwork programs and there are an increasing number of independent and educational stations, stations in different communities broadcast substantially the same nonnetwork programs over any extended period of time.[6] See, e.g., *Midwest Television, Inc.*, 15 F.C.C. 2d 478, 484, 501. Thus, beyond basic broadcast services (consisting of the signals of the three networks, one independent, and one educational station), the diversity gained by cumulative broadcast signals is largely a matter of choice of viewing times, rather than any real additional choice in terms of new or different programing. We believe that much more significant additional choice of programing is likely to be achieved in the long run if some cable channels are devoted to program origination.

14. While we have accordingly concluded that, at least for the present, CATV operators should be eligible to engage in program origination, and encouraged or even required to do so, the December 13 notice proposed to limit origination by the CATV operator (apart from automated services) to one channel. This proposal is based on our tentative view that one entity should not control the content of the program materials on all cable channels not used for carriage of broadcast signals. It also accords with the long-standing principle in the television broadcast field that one entity should not be authorized, or have an interest in, more than one television channel serving the same area. In other words, the proposed one-channel limitation is designed to promote diversity of control and not to limit the quantity of origination on the cable or to restrict the opportunities for achievement of maximum diversity of program choices to the public. On the contrary, the realization of such benefits for the public is the Commission's basic goal, and we think that they are more apt to be achieved if others besides broadcasters and CATV operators have access to the cable channel capacity to reach the public with communications of their choice, free from control by the CATV operator as to content. The comments have raised the issue of whether there should be a limitation based on percentage of channels (e.g., to take into account the difference between a 12-channel and a 40-channel system), or whether there should be an initial period in which the CATV operator would not be restricted to only one channel for origination. We shall consider these alternatives in our subsequent reports in this general area of diversification. It is sufficient to note here that there is clearly need for regulatory action in this respect.

15. There is also, in our opinion, a need for additional means by which various entities can communicate with the public via television

[6] Indeed, it is this which causes broadcaster concern as to methods of affording independent stations (and network stations to the extent that they present nonnetwork programs—generally about 45 percent of their schedule), some measure of exclusivity against duplication by other, more distant broadcast signals carried on the cable.

at low cost. Access to the public via the broadcast medium is necessarily restricted to a few, and those able to obtain a license—though under an obligation to operate in the public interest—are not common carriers (see sec. 3(h) of the Communications Act) and generally retain control over access to their facilities by others. Cf. *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission*, 395 U.S. 367. Moreover, cable television service has tended to develop on a noncompetitive monopolistic basis in the areas served, so that only one cable enters the subscriber's premises. Persons who are not in a position to engage in broadcast or CATV operations or to acquire time—or as much time as desired—on the broadcast media, could nevertheless obtain television access to the public if a portion of the channel capacity of a community's only cable system were reserved for their use on a common carrier basis. As indicated in the notice (pars. 8, 26), those desiring such access might include political candidates, municipal and State governmental authorities, educational interests, civic and professional organizations, amateur dramatic groups, professional program producers, advertisers, etc. Other entities might well take advantage of the facilities if they were made available on this basis.

16. In light of the foregoing, it is our opinion that the public interest would be served by encouraging CATV systems to operate as common carriers on some channels. Entities desiring to do so should be permitted to communicate with the public in a community, or in a particular segment of a community, or in a number of communities on a State, regional, or national basis to the extent that cable facilities are available and are interconnected.[7] CATV operators should be able to furnish studio facilities and technical assistance as part of the service, but should have no control over program content except as may be required by the Commission's rules and applicable law. And here, again, we think that at present innovation and experimentation should be encouraged and that such public use of CATV facilities should be free from restriction by local, State, or Federal authority (or by private parties) as to the types of program material to be presented (with the exception of possible restrictions applying to illegal lotteries, obscenities, etc.). However, action will be forthcoming only after further study.

17. We believe it important also to set out the Commission's position on two other matters—interconnection of cable systems and commercials on origination channels. The Commission would feel compelled to oppose on behalf of the public, any proposal which would preclude CATV systems from leasing channels to others for program origination of any kind or from interconnecting on a regional or national basis for any purpose, including the distribution of entertainment type programing. We strongly believe that the promise of this new technology should not be stifled by foreclosing the possibilities that some of these 20–40 channels might be opened to others on a common carrier basis and that significant new diversity of programing and other

[7] We recognize, of course, that systems with smaller channel capacity may have less space to offer for use by others than systems with many channels, and that some may have nothing left after providing for carriage of broadcast signals and CATV origination. In par. 25 of the notice, the Commission posed a question as to whether automatic services should be subject to displacement if there is a greater demand for leased channels than can be accommodated. A similar issue might ultimately arise with respect to a possible ceiling on the number of broadcast signals that may be carried where channel scarcity is a factor.

services might be brought to the American people through regional or national interconnection, including competition to the present three national television networks. In the domestic satellite proceeding it has been suggested that CATV cable channel capacity might be utilized as a means for local distribution of satellite communications. Finally, we note that the public interest would be best served by permitting CATV operators to derive revenues from commercials to help defray the cost of their originations, or programing presented by others on leased channels, and provide the public with a new type of service—one where commercials occur only at natural intermissions or breaks in program material (see pars. 31–38 below).

II. SPECIAL RULEMAKING PROPOSALS

A. Required origination and the economic basis

18. *Origination requirement.*—In the December 13 notice, the Commission proposed to require origination by all but small systems as a condition for the carriage of broadcast signals (pars. 16–17). Most of those favoring encouragement of origination (with some exceptions such as the city of New York and the Screen Actors Guild) were opposed to any mandatory requirement. Apart from jurisdictional challenges, it is asserted that CATV systems should retain flexibility to do as they judge best in their own circumstances, that origination is beyond the means of many existing systems; and that a requirement imposed on a reluctant operator might result in token compliance rather than the initiative and experimentation needed to develop the full potential.

19. After full consideration of the comments, we remain of the view that the public interest would be served by conditioning, where practicable, the carriage of broadcast signals upon a requirement for program origination. It appears to us that this would be the most effective way to encourage origination. While such a requirement would make no difference for those systems who would voluntarily originate in any event, it should stimulate origination by systems which would otherwise not do so.[8] Moreover, we think it reasonable to place this condition on the carriage of broadcast signals. The use of broadcast signals has enabled CATV to finance the construction of high capacity cable facilities.[9] In requiring in return for these uses of radio that CATV devote a portion of the facilities to providing needed origination service, we are furthering our statutory responsibility to "encourage the larger and more effective use of radio in the public interest" (sec. 303(g)). The requirement will also facilitate the more effective performance of the Commission's duty to provide a fair, efficient, and equitable distribution of television service to each of the several States

[8] It appears from the comments, for example, that one CATV system (717 subscribers) is required by its franchise to originate, and does originate, a substantial variety of programs for approximately 30 hours a month. A commonly owned system in the same State (1,154 subscribers) is under no such requirement and does not originate any programing.

[9] Moreover, we have proposed the use of 12-GHz frequencies in a local distribution service to permit CATV systems to achieve economies in construction and to expand their service areas. Notice of proposed rulemaking in docket No. 18452 (F.C.C. 69–141).

and communities (sec. 307(b)), in areas where we have been unable to accomplish this through broadcast media.

20. In addition, the origination requirement will help ensure that origination facilities are available for use by others originating on leased channels. We think that this is necessary as a practical matter if the public is to take advantage of any common carrier offering on a widespread basis. It is unlikely that many would-be lessees would possess their own origination equipment and studio, particularly those desiring only occasional use. For example, political candidates cannot make effective use of cable facilities for communication with the public unless the CATV system has origination equipment and provides technical assistance. In view of the importance of an informed electorate and speech concerning public affairs to self-government, the "right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences", and the CATV system's monopoly position over cable access to the subscriber's premises, we think that CATV operators have an obligation analogous to that of the broadcasters "to give suitable time and attention to matters of great public concern" and also to have the equipment needed for origination by others. *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 389–394. The Commission is not powerless to insist that CATV do so as a condition for the use of broadcast signals, and certainly for the use of microwave radio frequencies in the conduct of its business. Moreover, in authorizing the receipt, forwarding, and delivery of broadcast signals, the Commission is in effect authorizing CATV to engage in radio communication, and may condition this authorization upon reasonable requirements governing activities which are closely related to such radio communication and facilities. Sections 2(a), 3(b), and 301 of the Communications Act.

21. While the public interest would be served by origination on as many systems as possible, and the public need may be greatest in small CATV communities lacking local television broadcast media, we recognize the validity of the argument that origination may be beyond the means of some systems. The notice specifically requested suggestions as to a possible cutoff point for mandatory origination in light of the cost of equipment and personnel minimally necessary for local origination. Some of the comments have been very helpful in this respect, particularly those of TeleMation, Inc.; Winchester TV Cable, Inc.; Jefferson-Carolina Corp.: Port Huron TV Cable Co.; Chillicothe Telcom, Inc.; and the filings based on the TeleMation study (e.g., Jerrold Corp.: Buckeye Cablevision, Inc.; etc.).

22. TeleMation, a manufacturer of cablecasting equipment, appended as table I to its filing the following summary of estimated costs of construction and operation of five cablecasting systems of varying degrees of sophistication (ranging from a full color system with two live vidicon cameras and a mobile van to a minimum monochrome system in which the weather channel (TM) doubles as a live camera):[10]

[10] TeleMation's estimated costs have been used by a number of those filing on behalf of CATV systems, and have not been challenged in the comments of others.

*Costs and technical data**

	Color system	Complete monochrome system	Basic monochrome system	Small monochrome system	Minimum monochrome system
Television equipment	$80,000	$36,000	$19,000	$7,900	$4,485
Studio construction and furnishings	15,000	9,000	5,300	1,600	
Total facilities cost	95,000	45,000	27,300	9,500	4,485
Annual principal and interest on 5-year schedule of amortization	22,200	10,510	6,315	2,220	1,050
Operating costs—Annual labor (with G&A):					
Director	14,400	14,400	9,450	4,720	1,000
Technician	10,150	5,075	2,550	2,550	500
Other	4,000	3,000	1,000		
Total labor	28,550	22,475	13,000	7,270	1,500
Maintenance	2,850	1,350	820	285	125
Power	325	240	180	100	50
Promotion	1,200	600	300	150	
Total operating costs—Annual	32,925	24,665	14,300	7,805	1,675
Total annual cost of facilities and operation	55,125	35,175	20,615	10,025	2,725
Number of subscribers needed to support cablecasting	1,150	730	430	215	55
Percent of net subscriber revenue needed to support cablecasting	[1] 15	[2] 16½	[3] 17	[4] 21½	[5] 11
Other costs—Annual:					
(a) Weather channel	$1,285	Included	Included	Included	Included
(b) Message channel	535	$535	$535	$340	$340
(c) News and stock channel	8,400	8,400	8,400	8,400	
(d) Films	9,600	9,600	6,000	[6]	[6]
(e) Modulators—as needed at $1,000/chanhel	470	470	470	470	235
Total other costs—Optional	20,290	19,005	15,405	9,210	575
Number of subscribers needed to support additional cablecasting options	425	395	325	190	12
Percent of net subscriber revenue needed to support cablecasting	[1] 4	[2] 9	[3] 13	[4] 19	[5] 3

*TeleMation appends the following notes to its analysis of cablecasting costs set forth above:

Line 1.—Television equipment includes: All video, audio, lighting (excluding overhead pipe grids and power distribution), and installation in prepared studio. Television equipment also includes modulators to convert video and audio signals to proper channel frequency.

Line 2.—Studio construction assumes that ownership is taken for a new or renovated building including air conditioning, power distribution and minimum space required for satisfactory programing. Costs and space estimated for cablecasting systems are described in system descriptions.

Line 3.—Assumes 25 percent downpayment, 4½ percent add-on interest, over a 5-year period of amortization and payment.

Line 4.—Operating costs were estimated as follows:

1. Labor—

(a) Director at $850 per month, plus 7 percent payroll benefits, plus 35 percent other G and A costs.

(b) Technician at $600 per month, plus same benefits and G and A ratios as above.

(c) Other labor costs include miscellaneous part-time help and time sharing of other system personnel.

(d) Amount of labor man hours allocated is less than full time for basic, small and minimum systems.

2. Maintenance is 3 percent of facilities cost per year.

3. Power cost assumes adequate lighting and other requirements for studio equipment at $0.03 per kw. hour. Studio is assumed to be in operation for programing for approximately 3 hours per day for 300 days annually. Automatic equipment operates 24 hours per day.

4. Promotion is considered to be in addition to regular system promotion expenses.

Line 5.—Subscriber income assumes $60 per year gross ($5 per month) less 20 percent for revenues paid directly for such things as franchise costs and other out-of-pocket expenses, resulting in a net revenue of $48 per year per subscriber.

[1] Percent of $7,500.
[2] Percent of $4,500.
[3] Percent of $2,500.
[4] Percent of $1,000.
[5] Percent of $500.
[6] Not available.

23. According to TeleMation, the complete monochrome cablecasting system includes:

Two live vidicon cameras with zoom lenses.
One film chain with two 16 mm. projectors, one 35 mm. projector and a film chain camera.
Minimum necessary lighting and audio equipment to produce professional looking programs.
EIA–RS 170 standards for video signal. Cameras are of high quality with 800 to 1,000 lines of horizontal resolution and a signal to noise ratio of approximately 50 db.
Two video tape 1-inch helical scan recorders.
Fader type switching with preview.
Screen splitter special effects generator.
Adequate monitoring and test equipment.
Control console with necessary remote controls and intercom system.
Automatic weather channel (TM) with slides on same channel.
One thousand square feet of studio space at $8 per square foot plus $1,000 furnishings.
No mobile van is included, but the equipment is designed so that necessary equipment for remote cablecasting can be transported satisfactorily in a station wagon or other company vehicle.

The basis monochrome system includes:

Single live camera with zoom lens.
One film chain connected to the weather channel (TM) with one 16 mm. film projector and one 35 mm. film projector.
Minimum necessary lighting and audio to produce professional looking programs.
EIA–RS 170 standards of video signal. Cameras are of high quality with 800 to 1,000 horizontal resolution and signal to noise ratio of approximately 50 db.
Two video tape 1-inch helical scan recorders.
Vertical interval switching with preview.
Minimum monitoring equipment.
Automatic weather channel (TM) on same channel.
Six hundred square feet of studio space at $8 per square foot, plus $500 furnishings.
No mobile van is included but equipment is designed so that equipment can be satisfactorily transported in a station wagon or other company vehicle for remote programing.

The color system is more elaborate than the above two, whereas the small and particularly the minimum monochrome systems are much more modest.[11]

24. There is no general consensus in the comments as to an appropriate cutoff point for an origination requirement. Micanopy Group Cos. state that origination should not be required for systems serving fewer than 2,000 subscribers, whereas Garden Spot Cable TV Services, Inc., asserts that systems with less than 2,500 subscribers are not in a position to produce meaningful local program origination. Port Huron

[11] TeleMation states that the small monochrome system includes:
Single live camera with zoom lens. Synchronizing standards are reduced to industrial two-to-one interlace. There is no video processing outside of that produced by the camera itself. Horizontal resolution is reduced to approximately 550 lines and signal to noise ratio is reduced to approximately 35 db. The cameras are less adaptable to broadcast style operating techniques. The zoom lens is reduced in range and type of controls.
There is no film chain although the weather channel (TM) has a projection slot for rented projectors.
Minimum lighting and audio.
One video tape 1-inch helical scan recorder.
One weather channel (TM) with reduced number of weather instruments.
Minimum monitoring.
Four hundred square feet of studio space at $4 per square foot as a refurbishing cost.
The camera and video tape recorder can easily be transported in an ordinary automobile for remote cablecasting.

TV Cable Co. states that it lost money on origination for 3 years until it reached 3,500 subscribers, and is making a modest profit with 4,900 subscribers.[12] TeleMation has appended the cablecasting schedule of the CATV system in South Lake Tahoe, Calif. (3,750 subscribers), which shows a variety of originations for several hours daily, 5 days a week. Chillicothe Telcom, Inc., asserts that it is not breaking even with 4,700 subscribers, but hopes to do so by the end of 1969.[13] Jefferson-Carolina Corp. originated on its system in Cheraw, S.C. (population 5,000), on a minimum budget with modest capital investment and found that operating expenses were entirely defrayed by advertising revenue; yet its experience was to the contrary in Lumberton (population approximately 15,000). Several parties urge that size should not be the only controlling factor, as smaller communities lacking other local outlets may have a greater need for—and give more support to—CATV origination than larger communities with other local media and higher demands as to quality. It is further asserted that there should be a grace period for experimentation before any requirement becomes effective. Those commenting on behalf of CATV interests are in agreement that advertising should be permitted to help support the cost of origination.

25. While some of the parties have supplied valuable information concerning their experience with origination, its cost and the size of the systems involved, it is obvious that the systems discussed in the comments constitute only a small percentage of the systems now engaged in origination and may not be typical of the norm. According to TV Factbook, services volume (1969–1970 edition, No. 39, pp. 363–a to 591–a), approximately 206 CATV systems are currently engaged in program origination (e.g., local live, film, video tape),[14] and a substantial number of additional systems plan to originate. Of the 206 systems currently originating, the number of subscribers is approximately as follows:

Number of subscribers:	*Number of systems*
Under 500	18
500–1000	36
1000–2000	50
2000–3500	39
3500–5000	24
Over 5000	39

See also the September 22, 1969, issue of Broadcasting Magazine, p. 46, concerning a recent NCTA survey on cablecasting and advertising by

[12] Port Huron originates 5–10 hours of local public service programing a month with black and white equipment which cost $55,500. Present annual operating costs (sharing personnel of a television station at little or no cost to the system) are $72,000, not including $25,000 worth of services performed by shared personnel. Port Huron does not have much needed remote control equipment; nor is it equipped for color, though its subscribers frequently ask for such service.

[13] Chillicothe has been originating 60 hours a month since 1964, with commercials since 1967. While it was then forced to use broadcast gear costing $200,000, Chillicothe states that it could now purchase the same thing in CATV equipment for $141,500. Annual operating costs are $106,250 (sharing some regular CATV personnel). Chillicothe competes for advertising with two local radio stations and a newspaper, and sells in the same manner as the radio stations—charging $3 per spot.

[14] These 206 systems do not include systems originating only automated services (such as time and weather, news ticker, stock ticker, emergency warning system, fire alarm system, etc.), music, and/or community and public service announcements. Nor does this figure include systems engaged in other origination where the number of subscribers was not available.

its members. Except in a few instances, the record contains no data about origination by these systems and such pertinent matters as the kinds and amount of origination, equipment used, cost of facilities, annual operating costs, personnel involved, advertising, financial success, or the response of the public to such origination efforts.

26. In the circumstances, we have decided not to prescribe a permanent minimum cutoff point for required origination on the basis of the record now before us. The Commission intends to obtain more information from originating systems about their experience, equipment, and the nature of the origination effort. We shall also issue a further notice of proposed rulemaking calling for additional public comment in light of the matters discussed herein. In the meantime, we will prescribe a very liberal standard for required origination, with a view toward lowering this floor in the further proceedings, should the data obtained in such proceedings establish the appropriateness and desirability of such action. The matter thus remains partially an open one, to be determined finally upon further analysis and experience.

27. The rules set forth in the appendix hereto (see sec. 74.1111(a)) make the origination requirement applicable to systems with 3,500 or more subscribers, effective January 1, 1971. This standard appears more than reasonable in light of the TeleMation filing,[15] our decision to permit advertising at natural breaks (see pars. 31–38 below), and the 1-year grace period. Moreover, it appears that approximately 70 percent of the systems now originating have fewer than 3,500 subscribers; indeed, about half of the systems now originating have fewer than 2,000 subscribers. We recognize that the 3,500 standard will encompass only a very small percentage of existing systems at present subscriber levels, less than 10 percent.[16] However, it should cover most existing and new systems in the nation's larger communities where the Commission is seeking to promote a new kind of CATV operation, based on good reception of local signals, program origination by the CATV operator and others, and possibly the provision of additional communications services to the public (see Dec. 13 notice, pars. 46, 60–61).

28. As pointed out in the comments, smaller communities lacking other local television outlets, or dependent upon only one, have a greater need for local origination and may give more support to CATV origination even if conducted on a comparatively modest basis. A small monochrome system, modest in equipment and cost, would never-

[15] In so concluding, we have made allowance for the circumstance that TeleMation's estimate of costs may by too low in some respects, e.g. 4½ percent interest expense and labor costs.

[16] The record reflects the following with respect to present system size:

Number of subscribers	Estimated percent of systems, 1969	Number of systems as of 1969
50–499	50.0	1,130
500–999	19.5	440
1,000–2,499	19.0	430
2,500–4,999	7.5	170
5,000–9,999	3.0	70
Over 10,000	1.0	20
	100.0	2,260

theless permit subscribers to view locally produced programing that otherwise might not be available at all; for example, a debate between local political candidates, a talk by the mayor or a local newscast. It would also afford a television outlet for advertising by local businessmen, who may have no interest in reaching the broader area outside of their market served by a television broadcast station. Moreover, the equipment of the small system (camera and video tape recorder) can be transported in an ordinary automobile for remote cablecasting. The circumstance that so many systems with fewer than 3,500 subscribers (approximately 140) have voluntarily undertaken at least some origination and a substantial number of others plan to do so, seems to indicate a fairly widespread industry belief that origination by comparatively small systems is feasible. Since any effort in that direction is very important in the public interest, we urge cable operators, as does NCTA, to do whatever they can to help satisfy this need. However, until more information is obtained in the further proceedings, we think that origination by smaller systems should continue to develop on a voluntary basis.

29. Clarification has been requested as to the meaning of the phrase "operate to a significant extent as a local outlet by originating" (par. 15 of the notice). By significant extent we mean something more than the origination of automated services (such as time and weather, news ticker, stock ticker, etc.) and aural services (such as music and announcements). Since one of the purposes of the origination requirement is to insure that cablecasting equipment will be available for use by others originating on common carrier channels, "operation to a significant extent as a local outlet" in essence necessitates that the CATV operator have some kind of video cablecasting system for the production of local live and delayed programing (e.g., a camera and a video tape recorder, etc.). If the cablecasting equipment and technical personnel are available, there should be a natural tendency for the CATV operator to use them for some origination presenting local personages and events. However, as earlier indicated, we do not mean to suggest that origination to a significant extent could not also include films and tapes produced by others,[17] and CATV network programing.

30. We will also refrain from any initial regulation relating to the hours of origination, categories of programing, the type of cablecasting equipment, and technical standards. As suggested in the comments, it appears appropriate to afford a period for free experimentation and innovation by the cable operators. Should it ultimately turn out that some requirements are necessary (e.g., equipment, technical standards, minimum hours of operation), we are in accord with the further suggestion in the comments that it would be reasonable to expect more of larger systems than small ones.[18] Moreover, we would

[17] We note that TeleMation has appended as exhibit C information about films produced by Interpet Productions, Inc., of Laguna Beach, Calif., for CATV systems in southern California. TeleMation states that such programs are geared to cable audiences, having been designed to supplement the programing fare available on television broadcast stations. The record further indicates that programs produced by other such organizations are available to CATV systems, e.g. American Diversified Services, Kingsport, Tenn.; Leeder Cable Services, Inc., Oceanside, N.Y.; Programming Corp. of America, Houston, Tex.; Gridtronics, Inc., New York, N.Y., etc.

[18] However, TV Factbook indicates that some smaller systems apparently do more hours of local live origination than some of the larger systems.

anticipate that any requirements might be quite liberal at the outset until the origination operations have had a reasonable opportunity to become established, as in the case of television broadcasting where the required minimum hours of operation are very small for the initial 18 months and gradually increase during four successive 6-month periods (sec. 73.651(a) of the Commission's rules).

31. *Economic basis.*—After consideration of the comments, we have concluded that advertising should be permitted at natural breaks in originations with no interruption of program continuity. It appears that advertising support (or some other revenue besides regular subscriber fees) may be necessary to contribute to the financing of local origination in some communities, in view of what the record reveals as to the cost of origination equipment and operating expenses.[19] Moreover, advertising support may enable origination operations by smaller systems in smaller communities than would otherwise be the case.[20] There is also indication in the record (e.g., the comments of the Department of Justice; those filed on behalf of Jerrold Corp. and others; Ameco, Inc.; Wheeling Antenna Co., and the American Association of Advertising Agencies) that some advertisers need additional television outlets, particularly those interested in reaching the limited audience served by a CATV system as compared to the much larger audience within the grade B contour of a television broadcast station.

32. There are, of course, other considerations which must be weighed. The American Civil Liberties Union asserts that advertising on CATV origination would subject CATV to the same motivation as the broadcaster to present programing designed to attract the largest possible audience. Hence, in order to encourage programing for minority audiences, it is urged that advertising should be prohibited, and that any additional financial base to support the costs of origination should be obtained from additional charges to subscribers viewing the originated programs. While this is one of the alternatives proposed in the notice, we think that considerations of practical necessity dictate a different course. Some systems in areas where the need for local origination is greatest simply may not have enough subscribers to support the costs of cablecasting equipment and personnel, even if basic fees are increased or per program fees are charged. Moreover, larger systems in larger communities may be faced with higher origination costs. There are important public benefits to be gained from having cablecasting equipment available on as many systems as possible for local production of programs by the CATV operator and others. In our judgment, these benefits are more likely to be realized on a widespread basis at an early date if we permit advertising at natural breaks than if we insist upon a mode of operation that may be more difficult and take longer to achieve.

33. However, we will leave open the question of whether advertising should be permitted in conjunction with possible eventual CATV net-

[19] Despite the claimed importance of distant signals to cable operations in major markets, all of the CATV comments addressing this question claim that subscriber fees alone cannot support origination, and that advertising revenue is necessary.

[20] It is asserted in some of the comments that advertising should not be permitted for the purpose of encouraging origination as there is no guaranty that the CATV operator would devote the proceeds to origination. We do not regard this as sufficient reason for depriving CATV of access to advertising revenue, particularly in view of our decision to require origination as a condition for carriage of broadcast signals on larger systems.

work operations. A broad subscriber base might enable the production and distribution of programing financed solely through subscriber fees. Indeed, CATV systems originating locally in this manner may find some competitive advantage in attracting viewers, particularly in the Nation's larger cities. See *Midwest Television, Inc.*, 13 F.C.C. 2d 478, 506, footnote 29. CATV operators are, of course, free to originate without commercials if they choose to do so and to experiment in this area. While we believe that the subscribing public should not be required to pay extra fees in order to obtain access to local public service programing or presentations by political candidates on the CATV's origination channel, we do not presently contemplate any prohibition against higher monthly fees or per program charges for other minority interest programing, or special charges for other extra services (e.g., burglar alarm and fire detection systems, etc.). In short, here again is an area requiring further study and possible future action only in the light of such study and experience.

34. The potential impact of CATV advertising on television and radio stations in small markets, and on new independent stations in large markets, is also pertinent. The notice specifically requested the parties to address themselves to varying situations in light of the local broadcast media, and sought information as to the nature and effect of existing advertising by CATV systems, including the rates charged and the kinds of advertisers attracted. While many of the comments on behalf of broadcast interests seek a prohibition against commercials on adverse impact grounds, their assertions are phrased in general terms and do not provide specific information or address varying situations. However, a few of the CATV comments do contain some information as to existing rates.

35. Chillicothe Telcom, Inc., which competes for advertising with two local radio stations and a newspaper, charges $3 per spot, the same rate as the radio stations. Winchester TV Cable, Inc., has a $50 hourly rate, and finds that sometimes advertisers will purchase time only if its commonly owned AM station, with its larger coverage, is included in the package. TeleMation asserts that the cost of CATV advertising generally ranges between 35 and 200 percent of the local AM radio rate. It appends what it regards as the fairly typical rate card of a system with fewer than 1,500 subscribers in Neosho, Mo. (population 7,452), which reflects the following:

Movie schedule sponsorship:

During periods available (when no local origination or educational channel broadcasts) exclusive sponsorship of the channel 9 (origination) movie schedule: $100 monthly.

Profile sponsorship (Monday through Friday schedule):

Local news, 4 minutes	$100 monthly.
Local sports, 4 minutes	Do.
Local weather, 4 minutes	Do.
Local featurette, 4 minutes	Do.
Editorial, 4 minutes	Do.
1-minute announcement	Do.
15-minute, 1 time specials	$50 each.
30-minute, 1 time specials	$100 each.

College basketball:

Away from home games (14 games, November through March, participation with other sponsors)	$80 monthly.

24 Hour weather channel service:

Trademark or name on any 1 instrument	$25 monthly.
1 slide on Carrosel	$15 monthly.
2 slides on Carrosel	$25 monthly.
4 slides on Carrosel	$40 monthly.
Sponsorship of weather forecast exclusively (exposure on each sweep of camera)	$150 monthly.

All contracts on 13-week minimum, with 10 percent discount for 12-month contracts.

TeleMation further states that the advertising rates vary from system to system, and by way of illustration attaches the rate cards of systems in Peru, Ill., and Gallup, N. Mex.[21]

36. While advertising rates vary considerably among television and radio stations, it appears to us that existing CATV rates are much more analogous to typical radio rates than they are to those of television stations generally, or UHF independents in particular. It would seem to follow that CATV advertising on comparatively small systems poses a greater possibility of adverse impact on the revenues of radio stations than on those of television stations. This situation obviously could change with the advent of larger systems in larger communities. For the present, we do not think that there is any threat to broadcast service to the public of sufficient immediacy to warrant a general prohibition on CATV advertising, or to outweigh the considerations discussed above (par. 31; see also our action below limiting such CATV advertising to natural breaks). However, we will examine documented claims of imminent adverse impact on the public's free broadcast service on a case-by-case basis, and take such action as may be warranted.

37. In paragraph 17 of the notice the Commission requested comment on the alternative of permitting CATV advertising only at nat-

[21] The Peru rate card is as follows:

		Per week				
		1	5	10	20	50
Announcements:						
Class I (5 p.m. to 12 p.m.)	60 sec	$12.00	$9.60	$8.40	$7.80	$7.20
	30 sec	9.00	7.20	6.30	5.85	5.40
Class II (9 a.m. to 5 p.m.)	60 sec	9.60	7.68	6.72	6.24	5.76
	30 sec	7.20	5.80	5.04	4.68	4.32

		Number of times			
		1	13	26	52
Local programing:					
Class I (5 p.m. to 12 p.m.)	Hour	$75.00	$64.75	$60.00	$56.25
	½ hr	45.00	38.25	36.00	33.75
	¼ hr	35.00	29.75	28.00	26.75
	10 min	25.00	22.25	20.00	18.75
	5 min	15.00	12.75	12.00	11.25
Class II (9 a.m. to 5 p.m.)	Hour	60.00	51.00	48.00	45.00
	½ hr	36.00	31.60	28.80	27.00
	¼ hr	28.00	23.80	22.40	21.00
	10 min	20.00	17.00	16.00	15.00
	5 min	12.60	10.20	9.60	9.00

Note.—Costs video tape advertisement production to be charged to advertisers.
Above rates based on normal programming costs.

ural breaks without interruption of program continuity.[22] TeleMation states that it would not oppose reasonable regulations upon the placement of commercials. The Pennsylvania Community Antenna Television Association reports that some of its members have expressed the opinion that the so-called magazine format might be more effective than interspersing commercials throughout the program material. Individual CATV operators contemplating origination have indicated similar views to us upon occasion. Those parties opposed claim principally that the Commission has no authority to regulate the placement of commercials, and, in any event, should treat broadcasters and CATV systems alike insofar as advertising is concerned.

38. We are not persuaded by the equal treatment argument. One service depends solely on advertising revenue, whereas the other has available subscriber fees as well. Moreover, since CATV origination has its base in the carriage of broadcast signals, the Commission has both the power and the responsibility to see to it that such hybrid operations do not undercut, but rather promote, our regulatory policies in the broadcasting field, in this instance the policy of encouraging new and diversified service to the public without impairment of other existing service. We believe that a rule requiring the placement of advertising at natural breaks in CATV originated material will best further this objective and would serve the public interest, for: (1) it would permit CATV to derive additional revenue to help defray the costs of origination;[23] (2) it would provide the public with a new type of service—one where commercials did not interrupt program material at the whim of the cablecaster; (3) it would afford advertisers a new and different type of outlet in terms of size and selectivity of audience, as compared to radio and television stations and printed media; and (4) it would be less apt to affect the advertising revenue available to local broadcast services to the same degree that the alternative of unlimited CATV commercials might. We conclude that the rule adopted herein. (see sec. 74.1117 in the appendix) is reasonably ancilliary to the effective performance of our responsibilities for the regulation of broadcasting, and is within the Commission's statutory and constitutional authority. *United States* v. *Southwestern Cable Co.*, 392 U.S. 157; *Midwest Television, Inc.*, 13 F.C.C. 2d 478, 504–505; 15 F.C.C. 2d 84, 91; see also discussion, infra, pp. 28–32.[24]

B. Equal time, sponsorship identification, fairness

39. In paragraphs 19–20 of the notice, the Commission proposed to adopt rules conditioning the carriage of broadcast signals by CATV

[22] By natural intermissions or breaks, we mean at the beginning or end of a particular originated program, or at any intermission in the program material which is beyond the control of the cable operator; such as timeout in a sporting event, an intermission in a concert or dramatic performance, a recess in a city council meeting, or an intermission in a long motion picture which was present at the time of theatre exhibition, etc.

[23] We will consider in the further proceedings the question of whether advertising should be permitted in connection with automated services if the system does not engage in cablecasting as defined herein, and whether some different provision should be made for advertising, if any, in connection with services of this nature.

[24] *Grosjean* v. *American Press Co.*, 297 U.S. 233, and *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 266, upon which several parties rely, are distinguishable. A regulation as to the placement of CATV commercials, for the reasons set forth above, is not comparable to a "deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guarantees," which the Supreme Court found bad in *Grosjean*. Nor does our regulation in any way go to the content of the commercials, or infringe upon the protection accorded to editorial advertising under the first amendment, as reflected in the *New York Times Co.* case.

systems engaged in program origination upon a requirement that such origination be conducted in accordance with the following conditions:

(*a*) A rule condition analogous to section 315 of the Communications Act and section 73.657 of the Commission's rules concerning broadcasts by candidates for public office;

(*b*) A rule condition analogous to section 317 of the Communications Act and section 73.654 of the Commission's rules concerning announcement of sponsored programs; and

(*c*) A rule condition analogous to the obligation referred to in section 315(a) of the Communications Act and the rules promulgated thereunder, to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

In view of our determination not to prohibit, but rather encourage, CATV origination, and to permit advertising, we have decided to adopt the rules set forth in the appendix with respect to equal time, fairness, and sponsorship identification. We believe that these requirements are necessary in the public interest for origination conducted in conjunction with carriage of broadcast signals. See paragraphs 40–47 below.

40. Despite some challenge to our jurisdiction to impose any requirements on CATV origination, there was general unanimity in the comments that, if origination is to be permitted, it would be desirable in the public interest for CATV to afford equal time to political candidates and reasonable opportunity for discussion of conflicting views on issues of public importance, and to identify sponsors. Most of the comments on behalf of CATV interests indicated that they would have no objection to conducting their orgination in this manner, and most broadcaster comments urged that they should be required to do so, assuming Commission jurisdiction. The comments of independent entities, such as the American Civil Liberties Union and the city of New York, also were in favor of equal time and fairness requirements. We think there is no real question but that CATV origination in conjunction with the carriage of broadcast signals should comport with these cardinal policies of the Communications Act, which are so important to the American political system and an informed electorate. *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission*, 395 U.S. 367. We shall therefore turn to the basis for our conclusion that we have jurisdiction to adopt the appended rules, which provide that no CATV system shall carry any broadcasting signal if the system engages in cablecasting unless such cablecasting is conducted in accordance with equal time, fairness, and sponsorship identification requirements patterned after those applicable to broadcasters.[25]

41. The contention that the Commission lacks authority under the Communications Act and the first amendment to condition CATV's carriage of broadcast signals upon reasonable regulations going to CATV program origination, was rejected in *Midwest Television, Inc.*, 13 F.C.C. 2d 478, 504–505, and in our opinion denying recon-

[25] The rules adopted herein are in some respects simpler than those governing broadcasters. Should they prove inadequate, the Commission can, of course, take appropriate rulemaking action to modify or supplement these rules in light of experience.

sideration, 15 F.C.C. 2d 84, 91, on grounds which are equally pertinent here. Moreover, the rules set forth in the appendix hereto come within the jurisdictional standard set forth by the Supreme Court in the *Southwestern* case supra. It is clearly necessary to the effective performance of our responsibilities for the regulation of television broadcasting that we require CATV systems engaged in program origination to abide by the same equal time and fairness requirements applicable to broadcasters. The Commission's responsibility for carrying out the provisions of section 315 of the Communications Act (sec. 315(c)) would be largely thwarted if unequal opportunities were afforded on CATV origination channels. For example, the CATV subscriber might tune his television set to channel 2, a broadcast channel granting equal time to candidates A and B, and then switch to channel 3, a CATV origination channel presenting only candidate A. Conceivably, the broadcaster might afford candidates A and B one-half hour each, on 1 day on channel 2, and the CATV operator might present only candidate A for several hours for a number of days on channel 3. Or, following the one-half hour appearances of candidates A and B on broadcast channel 2, the CATV operator might present only candidate A for the next 3 hours on the same channel in place of broadcast program material deleted pursuant to the Commission's nonduplication rules (sec. 74.1103 (e) and (f)). See footnote 26 of the *Midwest* decision, supra.

42. Similarly, the requirement that broadcasters present both sides of controversial issues of public importance—an obligation inherent in the public interest standard and properly imposed on broadcasters by the Commission to implement congressional policy (*Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission*, 395 U.S. 367, 379–386), would be grossly circumvented if the CATV subscriber receives both sides when he tunes his television set to a broadcast channel at a time when broadcast program material is being presented but only one side when he switches to a CATV origination channel or stays tuned to the broadcast channel at a time when CATV origination has been substituted for deleted broadcast material.

43. We think that similar considerations necessitate CATV compliance with the legislative policy reflected in section 317 of the Communications Act, which recognizes that sponsorship identification is essential to an informed public. Here, again, our rules requiring such announcements by broadcasters would be substantially undercut if CATV originated material presented in conjunction with broadcast signals failed to reveal that the CATV operator had received money, service or other valuable consideration for presenting such material (e.g., a controversial issue program without divulgence of the entity seeking to persuade the public).

44. We could not, consistent with our statutory responsibilities, permit a CATV operator to place broadcast signals in a setting of inequality, unfairness, and hidden sponsorship which would destroy the signals' integrity and defeat the purposes of the obligations imposed on broadcasters in the public interest.[26] Our statutory authority over

[26] We wish to make clear that we do not impute such undesirable practices to the cable industry. Indeed, to the best of our knowledge, the systems which originate programing have attempted to treat political candidates and controversial issues fairly.

interstate communication' by wire or radio necessarily encompasses power to prohibit CATV systems from carrying broadcast signals in conjunction with CATV origination that does not afford equal time to political candidates or present both sides of controversial issues of public importance or reveal program sponsorship. The CATV operator may conduct his origination in such fashion if he chooses to do so on a system carrying no broadcast signals. But we cannot permit the carriage of broadcast signals under circumstances so patently contrary to the public interest. We conclude that statutory authority for adoption of the rules in the appendix hereto is contained in sections 2, 3, 4(i), 301, 303, 307, 308, 309, 315, and 317 of the Communications Act. Cf. *Wrather-Alvarez Broadcasting, Inc.* v. *Federal Communications Commission*, 248 F. 2d 646 (C.A.D.C., 1957).

45. We believe that for the reasons developed (supra, pars. 41–44) our action in this respect is "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting" (*United States* v. *Southwestern Cable Co.*, supra, at p. 178). We would also note that *Southwestern* emphasized the breadth of the Commission's regulatory power:

The Act's provisions are explicitly applicable to "all interstate and foreign communication by wire or radio * * *." 47 U.S.C. § 152(a). The Commission's responsibilities are no more narrow: it is required to endeavor to "make available * * * to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communication service * * *." 47 U.S.C. § 151. The Commission was expected to serve as the "single Government agency" with "unified jurisdiction" and "regulatory authority over all forms of electrical communication, whether by telephone, telegraph, cable, or radio." It was for this purpose given "broad authority." As this Court emphasized in an earlier case, the Act's terms, purposes and history all indicate that Congress "formulated a unified and comprehensive regulatory system for the industry." *F.C.C.* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137. (Footnotes omitted.) Id. 167–168.

Elsewhere the decision states (id. 172–173):

> Certainly Congress could not in 1934 have foreseen the development of community antenna television systems, but it seems to us that it was precisely because Congress wishes "to maintain, through appropriate administrative control a grip on the dynamic aspects of radio transmission" *F.C.C.* v. *Pottsville Broadcasting Co., supra*, 309 U.S. at 138, 60 S. Ct. at 439, that it conferred upon the Commission a "unified jurisdiction" and "broad authority." Thus "[u]nderlying the whole [Communications Act] is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors." *F.C.C.* v. *Pottsville Broadcasting Co., supra*, at 138. Congress in 1934 acted in a field that was demonstrably "both new and dynamic," and it therefore gave the Commission "a comprehensive mandate," with "not niggardly but expansive powers." *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 219. We have found no reason to believe that § 152 does not, as its terms suggest, confer regulatory authority over "all interstate * * * communication by wire or radio." (Footnotes omitted.)

46. Assuming statutory authority, we think that the claim of first amendment abridgment is clearly without merit. As stated in *Midwest*, supra, no one has a first amendment right to provide broadcast signals to the public in a manner contrary to the public interest (15

F.C.C. 2d at 91). Nor does the circumstance that CATV program origination may be economically dependent upon carriage of broadcast signals give rise to an indirect infringement of first amendment rights. Since CATV systems use broadcast signals as the backbone of the service they provide, they come within the regulation of this agency, if reasonably related to the public interest. If the regulation is so related, it is not barred by the first amendment (see above discussion; *NBC* v. *U.S.*, 319 U.S. 190).[27] The above regulations are clearly reasonably related to the public interest. Far from being inconsisent with the first amendment—which is of course one of the most crucial aspects of the public interest—the regulations promote the purposes of the first amendment. As the Supreme Court stated in *Red Lion*, supra, 395 U.S. at 390:

> It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964); *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana*, 379 U.S. 64, 74–75 (1964). See Brennan, The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 Harv. L. Rev. 1 (1965). It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.

47. In holding that the equal time and fairness requirements on broadcasters are consistent with the purposes of the first amendment the Court gave reasons which also seem equally applicable to origination by a CATV operator (395 U.S. at 392):

> Nor can we say that it is inconsistent with the First Amendment goal of producing an informed public capable of conducting its own affairs to require a broadcaster to permit answers to personnel attacks occurring in the course of discussing controversial issues, or to require that the political opponents of those endorsed by the station be given a chance to communicate with the public. [Footnote omitted.] Otherwise, station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed. There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all. "Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests." *Associated Press* v. *U.S.*, 326 U.S. 1, 20 (1944).

We see no indirect infringement of first amendment rights in the rules adopted herein.

CONCLUSION

48. In light of the foregoing, we conclude that the public interest would be served by adoption of the rules set forth in the appendix hereto, effective 30 days from publication of this order in the Federal

[27] It is thus immaterial that the scarcity of frequencies rationale underlying first amendment rulings in the broadcast field does not apply directly to the cable technology. In view of the above analysis, it is also unnecessary to reach the question of economic scarcity (see *Red Lion*, supra, 395 U.S. at footnote 28). We do note the CATV operator's monopoly control over cable channels of communication to the home—i.e., that cable television's operations have developed on a noncompetitive, monopolistic basis in the particular areas served, with no instance, to our knowledge, where a member of the public subscribes to more than one cable television service.

Register. Upon such entry in force, we point out that State or local regulations or conditions inconsistent with these Federal regulatory policies are, we believe, preempted. See *Head* v. *New Mexico*, 374 U.S. 424 (1963).[28] Authority for such rules are contained in sections 2, 3, 4 (i) and (j), 301, 303, 307, 308, 309, 315, and 317 of the Communications Act. We further conclude that a final determination on the other aspects of the proposed rulemaking discussed herein should be the subject of a further report and order.

49. Accordingly, *It is ordered*, That the rules set forth in the appendix hereto *Are adopted*, effective December 1, 1969, and the Commission retains full jurisdiction over all other aspects of this proceeding.

FEDERAL COMMUNICATIONS COMMISSION
BEN F. WAPLE, *Secretary*.

APPENDIX

Part 74, subpart K, is amended as follows:

1. In section 74.1101, new paragraphs (j) and (k) are added as follows:

§ 74.1101 Definitions.

* * * * * * *

(j) *Cablecasting.* The term "cablecasting" means programming distributed on a CATV system which has been originated by the CATV operator or by another entity, exclusive of broadcast signals carried on the system.

(k) *Legally qualified candidate.* The term "legally qualified candidate" means any person who has publicly announced that he is a candidate for nomination by a convention of a political party or for nomination or election in a primary, special, or general election, municipal, county, state or national, and who meets the qualifications prescribed by the applicable laws to hold the office for which he is a candidate, so that he may be voted for by the electorate directly or by means of delegates or electors, and who:

(1) Has qualified for a place on the ballot, or

(2) Is eligible under the applicable law to be voted for by sticker, by writing his name on the ballot, or other method, and (i) has been duly nominated by a political party which is commonly known and regarded as such, or (ii) makes a substantial showing that he is a bona fide candidate for nomination or office.

2. A new section 74.1111 is added to read as follows:

§ 74.1111 *Cablecasting in conjunction with carriage of broadcast signals.*

(a) Effective on and after January 1, 1971, no CATV system having 3,500 or more subscribers shall carry the signal of any television broadcast station unless the system also operates to a significant extent as a local outlet by cablecasting and has available facilities for local production and presentation of programs other than automated services.

(b) No CATV system shall carry the signal of any television broadcast station if the system engages in cablecasting, either voluntarily or pursuant to paragraph (a) of this section, unless such cablecasting is conducted in accordance with the provisions of §§ 74.1113, 74.1115, 74.1117, and 74.1119.

3. A new section 74.1113 is added to read as follows:

§ 74.1113 *Cablecasts by candidates for public office.*

(a) *General requirements.* If a CATV system shall permit any legally qualified candidate for public office to use its cablecasting facilities, it shall afford equal opportunities to all other such candidates for that office to use such facilities: *Provided*, That such system shall have no power of censorship over the material

[28] Compare pars. 21–22, 26 of the Dec. 13 notice herein. In other words, we think that States and localities should remain free to impose additional affirmative obligations on CATV systems, so long as they refrain from imposing restrictions which are inconsistent with the Federal regulatory policies.

cablecast by any such candidate; *And provided further*, That an appearance by a legally qualified candidate on any:

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of the facilities of the system within the meaning of this paragraph.

NOTE.—The fairness doctrine is applicable to these exempt categories. See § 74.1115.

(b) *Rates and practices.*

(1) The rates, if any, charged all such candidates for the same office shall be uniform, shall not be rebated by any means direct or indirect, and shall not exceed the charges made for comparable use of such facilities for other purposes.

(2) In making facilities available to candidates for public office no CATV system shall make any discrimination between candidates in charges, practices, regulations, facilities, or services for or in connection with the service rendered, or make or give any preference to any candidate for public office or subject any such candidate to any prejudice or disadvantage; nor shall any CATV system make any contract or other agreement which shall have the effect of permitting any legally qualified candidate for any public office to cablecast to the exclusion of other legally qualified candidates for the same public office.

(c) *Records, inspections.* Every CATV system shall keep and permit public inspection of a complete record of all requests for cablecasting time made by or on behalf of candidates for public office, together with an appropriate notation showing the disposition made by the system of such requests, and the charges made, if any, if the request is granted. Such records shall be retained for a period of two years.

(d) *Time of request.* A request for equal opportunities must be submitted to the CATV system within one week of the day on which the prior use occurred.

(e) *Burden of proof.* A candidate requesting such equal opportunities of the CATV system, or complaining of noncompliance to the Commission, shall have the burden of proving that he and his opponent are legally qualified candidates for the same public office.

4. A new section 74.1115 is added to read as follows:

§ 74.1115. *Fairness Doctrine; Personal attacks; Political editorials.*

(a) A CATV system engaging in cablecasting shall afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

NOTE.—See Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 Fed. Reg. 10413.

(b) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the CATV system shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the cablecast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the system's facilities.

(c) The provisions of paragraph (b) of this section shall not be applicable (1) to attacks on foreign groups or foreign public figures; (2) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (3) to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (b) of this section shall be applicable to editorials of the licensee).

(d) Where a CATV system, in an editorial, (1) endorses or (2) opposes a legally qualified candidate or candidates, the system shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (*a*) notification of the date, time, and channel of the editorial; (*b*) a script or tape of the editorial; and (*c*) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the system's facilities; *Provided, however,* That where such editorials are cablecast within 72 hours prior to the day of the election, the system shall comply with the provisions of this paragraph sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.

5. A new section 74.1117 is added to read as follows:

§ 74.1117 *Advertising.*

A CATV system engaged in cablecasting may present advertising material at the beginning and conclusion of each cablecast program and at natural intermissions or breaks within a cablecast, *Provided* That the system itself does not interrupt the presentation of program material in order to intersperse advertising; *And provided, further,* That advertising material is not presented on or in connection with cablecasting in any other manner.

NOTE.—The term "natural intermissions or breaks within a cablecast" means any natural intermission in the program material which is beyond the control of the CATV operator, such as time-out in a sporting event, an intermission in a concert or dramatic performance, a recess in a city council meeting, an intermission in a long motion picture which was present at the time of theatre exhibition, etc.

6. A new section 74.1119 is added to read as follows:

§ 74.1119 *Sponsorship identification.*

(a) When a CATV system engaged in cablecasting presents any matter for which money, services, or other valuable consideration is either directly or indirectly paid or promised to, or charged or received by, such system, the system shall make an announcement that such matter is sponsored, paid for, or furnished, either in whole or in part, and by whom or on whose behalf such consideration was supplied; *Provided, however,* That "service or other valuable consideration" shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a cablecast unless it is so furnished for consideration for an identification in a cablecast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the cablecast.

(b) Each system engaged in cablecasting shall exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any program matter for cablecasting, information to enable it to make the announcement required by this section.

(c) In the case of any political program or any program involving the discussion of public controversial issues for which any films, records, transcriptions, talent, scripts, or other material or services of any kind are furnished, either directly or indirectly, to a CATV system as an inducement to the cablecasting of such program, an announcement to this effect shall be made at the beginning and conclusion of such program; *Provided, however,* That only one such announcement need be made in the case of any such program of 5 minutes' duration or less, either at the beginning or conclusion of the program.

(d) The announcements required by this section are waived with respect to feature motion picture films produced initially and primarily for theatre exhibition.

CONCURRING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

Although the report and order herein is lengthy, the results are, simply, that any CATV

(*a*) may originate programs without limitation as to number of channels, and, beginning January 1, 1971, any system with 3,500 or

more subscribers is required to originate programs to a "significant extent";

(*b*) may sell advertising to present on natural breaks or "intermissions" only; and,

(*c*) must comply with the equal opportunity and fairness doctrine provisions of section 315 of the Act and sponsorship identification provisions of section 317 of the Act.

I believe that these provisions serve the public interest. However, since there are certain presumptions in the Report and Order with which I do not agree, I concur only in the result.

DISSENTING STATEMENT OF COMMISSIONER ROBERT E. LEE

Without reaching the merits of the order adopted here, I must dissent on the grounds that the complexion of the Commission is about to change by almost one-third. Our new colleagues will be administering the important policy matters here adopted, with which they may or may not agree. If they wished, they could conceivably reverse this decision which could be awkward.

APPENDIX D

F.C.C. 70-677

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

AMENDMENT OF PART 74, SUBPART K, OF THE COMMISSION'S RULES AND REGULATIONS RELATIVE TO COMMUNITY ANTENNA TELEVISION SYSTEMS; AND INQUIRY INTO THE DEVELOPMENT OF COMMUNICATIONS TECHNOLOGY AND SERVICES TO FORMULATE REGULATORY POLICY AND RULEMAKING AND/OR LEGISLATIVE PROPOSALS	Docket No. 18397

MEMORANDUM OPINION AND ORDER

(Adopted June 24, 1970; Released July 1, 1970)

BY THE COMMISSION: COMMISSIONERS BARTLEY AND JOHNSON CONCURRING IN PART AND DISSENTING IN PART AND ISSUING STATEMENTS; COMMISSIONERS COX AND WELLS CONCURRING IN THE RESULT.

1. We have before us a number of petitions for reconsideration of our First Report and Order herein, released October 27, 1969, 20 FCC 2d 201, 34 F.R. 17651. In that decision, following a Notice of Proposed Rule Making and Notice of Inquiry of December 13, 1968 (15 FCC 2d 417, 33 F.R. 19028), we dealt with certain aspects of community antenna television (CATV) service. We determined that the public interest would be served by program origination (cablecasting) over CATV systems, and accordingly adopted a requirement for such cablecasting after January 1, 1971 by systems with 3,500 or more subscribers, leaving to further proceedings the question of whether the requirement should be made applicable to smaller systems. We also authorized advertising on cablecasts, limited to the beginning and end of each program, and to such "natural breaks or intermissions" within programs as are beyond the control of the CATV operator. We also made applicable to cablecasting requirements similar to those of Sections 315 and 317 of the Communications Act with respect to equal opportunities for political candidates, fairness in the treatment of controversial issues of public importance, and sponsorship identification. Other issues raised by the December 13, 1968 Notice (e.g., diversification of control, common carrier operations by CATVs, importation of distant signals) were left for subsequent resolution.

2. The joint petition for reconsideration of Cablecom-General, Inc., Communications Properties, Inc., Pennsylvania Community Antenna Television Association, Inc., Service Electric Company and Texas CATV Association, Inc. supports the Commission's objectives of pro-

moting multi-purpose CATV operation combining the carriage of broadcast signals, program origination and common carrier services. However, it urges that a compulsory origination requirement, limitations upon advertising, and the possibility of a dual Federal-State regulatory system are undesirable. With respect to the origination, or "cablecasting," requirement, it is urged that to compel cablecasting by systems not adequately prepared to undertake it will not advance the Commission's aims, but rather will retard their realization. The petition urges that there is no valid basis for assuming that CATV systems not now originating programs do not have a valid reason for failing to do so; uncertainties over copyright legislation and state public utility regulation as well as economic problems related to capital requirements are referred to as possible obstacles to effective cablecasting. To force unprepared systems to undertake cablecasting, it is said, will result only in poor service and the discouragement (because of fear of future unknown requirements) of cablecasting by others who might otherwise undertake it voluntarily. The pleading states that a sound judgment in this area requires further study of the costs of program origination, and that substantial outlays should not be required in the face of so many uncertainties, including the Commission's own statement that unforeseen impact upon television broadcast service would be remedied in some unspecified manner. In sum, it is urged that the industry is making substantial strides in this area upon a voluntary basis, and that this situation should not be disturbed.[1]

3. We have carefully considered these contentions, but are not persuaded that either the public or the CATV industry would be better served by deleting the cablecasting requirement. As the petitioners state, there is no disagreement about the value and importance of cablecasting. Since many systems are now originating, the general feasibility of origination is no longer in doubt, and we believe that we adopted a reasonable cut-off point in limiting the applicability of our rule to systems with at least 3,500 subscribers. The First Report and Order covers this issue in detail,[2] including available data on costs, and the initial rule adopted in that document is very broad, permitting great flexibility in cablecasting operations. We have been given no data tending to demonstrate that systems with 3500 subscribers cannot cablecast without impairing their financial stability, raising rates or reducing the quality of service. We recognize that there are some uncertainties, but these uncertainties have not prevented the inauguration of cablecasting by many systems.[3] Innovative arrangements are also possible, such as agreements with educational institutions under which a channel is made available for the use of the school which, with its own studio and other facilities, will produce educational, cultural

[1] The petition is supported by a resolution adopted by The Pennsylvania Community Antenna Television Association, Inc. making the same points, and stating particularly that if cablecasting is not self-supporting, subscribers must either face increased charges or poorer service.

[2] It points out that 70% of the systems now originating have fewer than 3500 subscribers.

[3] We may note particularly in this regard that we see no substantial threat to television broadcast service warranting Commission action in the foreseeable future, particularly since cablecasting would be of programs bought or produced in the open market. In any event, voluntary cablecasting would, of course be subject to the same caveat of possible remedial action if television service were threatened in a respect inimical to the public interest.

and other programing. The CATV of course would be expected to see to it that local political and other affairs are covered on that or a different channel, but the costs of origination to it would be sharply reduced. We do not see, therefore, why a reasonable requirement for cablecasting should produce less quality origination than would otherwise be produced.[4] The rule adopted is minimal in the light of the potentials of cablecasting and, on our own motion, we are postponing the date when originations must commence to April 1, 1971, to afford additional preparation time.

4. Indeed, we recognize that there is a question of whether we should not go beyond the minimal rule and specify a minimum number of hours for local live origination (as against presenting primarily film). We adhere to the judgment, set out in par. 30 of the First Report—namely, that it is appropriate to afford a period of free experimentation and innovation by cable operators. However, there is one development which does require consideration. It has come to our attention that some cable operators simply lease their origination channel to a local radio station, which in turn presents its disc jockey shows over this channel for virtually the entire broadcast day. While the cable operator is perfectly free to enter into arrangements with local broadcast stations during the period of experimentation (subject of course to whatever limitations are adopted with respect to cross-ownership in this field—see Notice, par. 23, 33 F.R. 18977, 19032–33), the main purpose is to provide an outlet for local expression. As we stated in the First Report, the very existence of "available facilities for local production and presentation of programs . . ." (74.1111(a)) is a most important contribution to the public interest, since it means that the mayor, the local political candidates, those willing to discuss controversial issues, etc., have a means of access to the television viewer. However, if the channel is unavailable for such presentation because it is leased out to a local broadcast facility for television presentation of its shows, the above purpose is frustrated. We therefore have amended 74.1111(a) to make clear that the CATV may not enter into any arrangement which inhibits or prevents the substantial use of the cable facilities for local programing designed to inform the public on issues of public importance.

5. Finally, Cablecom-General *et al.* urge that we conduct further rule making before requiring common carrier service by CATV's, and that we act to end the possibility of confusing dual State-Federal regulation. Both of these subjects require further exploration beyond the bounds of our First Report and Order of October 27, 1969, and cannot appropriately be dealt with here.

6. Several parties[5] urge that the Commission, in encouraging cablecasting, has embarked upon a new course with respect to CATV, which was previously limited to the role of a supplement to broadcast television service. They say that CATV, still founded upon the carriage

[4] There is always the possibility of waiver in a particular case, but we stress that it will be granted only because of unusual circumstances.

[5] E.g., American Broadcasting Company, Association of Maximum Service Telecasters, a group of television stations (WAVE–TV, *et al.*), the National Association of Broadcasters, and the All-Channel Television Society. ABC also urges full licensing of CATV, and a re-examination of policies on the carriage of non-local broadcast signals, matters beyond the scope of the First Report and Order of October 27, 1969.

of broadcast signals, but now encouraged to originate programs independently, will be a greater threat to the public's continued reception of "free" programs than either previous CATV operations or subscription television broadcasting. The latter, they point out, has been channelled so as to give the public something different from what it receives on free TV and to avoid siphoning the present free programming fare. We agree that where cablecasting is accompanied by a per-program or per-channel fee, it is akin to subscription television and presents the same threat of siphoning programs away from free television [6] in favor of a service limited to those who can pay and, in the case of cablecasting, to those to whom the cable is geographically available. Remedial action in this area should not wait upon the threat becoming actuality. As was the case with subscription television, protection of the public requires that action be taken at a time when it involves no disruption of existing patterns. The adoption of rules similar to those preventing siphoning television programs from free television broadcasting to subscription television broadcasting will serve to insure that cablecasting does not merely force the public to pay for what it now receives free. They are additionally warranted here because of CATV's inability to serve the same audience reached by a television broadcast station, and they serve the same purpose of protecting those who do not wish, or cannot afford, to pay for television. Finally, we believe that as is the case with subscription television, advertising should not be permitted where the public pays directly for the programs. This additional economic support should not be necessary, and it would be contrary to the public interest. Appendix A hereto adds a new Section 74.1121 to our rules to accomplish these purposes. [7] However, we do not believe that cablecasting unaccompanied by per-program or per-channel charges presents a substantial threat of siphoning, or that such cablecasting, which we wish to stimulate, should be restricted to one channel or limited to sponsorship by local advertisers in small communities. The basis for this judgment is that when CATV operates in its present fashion (i.e., a flat charge in a generally well-defined range), it poses no significant threat of siphoning programming from the regular television system, and thus, adoption of the pay-TV restrictions to ordinary cablecasting services would inhibit the development of such services, without any present basis or need for the inhibition. The Commission will of course be prepared to take remedial action if in the future charges for programs should be hidden in increased general subscriber charges. At the present time, however, we see no warrant for

[6] MST has shown that cable systems have plans to carry feature films, and sports such as hockey and basketball. Furthermore, the potential revenue from cablecasting accompanied by per-program or per-channel charges is substantial. With such charges, potential revenues are adequate to make siphoning a real possibility. Thus, as MST points out, with 10 million subscribers in the United States, an average of $2 per month per home would generate revenues of $240 million per year, enough to remove all professional sports from free TV. Slightly higher charges would give the same revenue with many fewer subscribers. Siphoning in particular areas would also be a problem. It is pointed out, for example by WAVE-TV *et al.*, that with 600,000 subscribers in the Philadelphia area (less than 30% penetration), a CATV system receiving an average of $7.50 per month per subscriber in fees plus per-program charges would have revenues above those of all the Philadelphia market television stations combined. We also note the affidavit of John A. Dimling, Jr., submitted by the NAB on the siphoning question.

[7] WAVE *et al.* propose more severe restrictions, such as a prohibition of any cablecast of live professional sports events or any recorded cablecast of these events within one week of their occurrence, and a prohibition of non-local variety programs. We believe these additional restrictions, at least without more experience, are too stifling.

placing upon ordinary cablecasting the restrictions appropriate to pay-TV operations. We stress that should we be mistaken in this regard and experience show the need for corrective action, we shall take such action at the first indication of the need therefor.

7. We note also other requests by several parties that we deal with CATV on a more comprehensive basis at this time, covering such issues as licensing, whether origination by the CATV operator should be permitted on more than one channel, regulation of common carrier operations, reporting requirements, and technical standards. We are not persuaded that all of these questions need be resolved before we proceed with the basic determinations made in the First Report and Order of October 27, 1969. CATV originations are still in their infancy and, so far as we know, common carrier operations are still in the future. These various issues are not being forgotten. Some are being acted on at this time; the others are beyond the necessary scope of this part of Docket No. 18397 and are matters we do not feel in a position to resolve at this time.[8] One further matter raised in the Notice of Proposed Rulemaking of December 13, 1968 should be dealt with at this time in view of indications that problems may now be arising, and that is the prohibition of lotteries. We are adopting a new Section 74.1116 to meet this problem.

8. The American Newspaper Publishers Association has urged that we add a new section to make clear that our requirements as to equal time for political candidates, the fairness doctrine, political editorials and personal attacks, advertising, and sponsorship identification requirements are not applicable to the dissemination of newspapers. We agree with the thrust of this petition that we did not intend to apply these requirements to the distribution of printed newspapers to their subscribers by way of cable. It does not appear necessary to amend the rule to make this clear. This opinion will constitute the Commission's definitive interpretation of the rules adopted in the October 27, 1969 Report and Order in this respect. However, we should also make clear that ordinary cablecasting is covered by the rules. It makes no difference on this question that a newspaper is the originator of the program any more than it would if a newspaper sponsored a program on a broadcast station. A news or public affairs program on a broadcast station owned by a newspaper is not exempt from fairness, sponsor identification and other requirements. The point is that we have no intention of regulating the print medium when it is distributed in facsimile by cable, but we do hold that the publication of a newspaper by a party does not put it in a different position from other persons when it sponsors or arranges

[8] The National Association of Educational Broadcasters has repeated a previous proposal with respect to priorities of service to be required of CATV systems, i.e., television signals required to be carried by our rules, State or local requirements, public service use in conjunction with educational agencies, common carrier service. Such requirements can best be considered in the context of some of the issues mentioned above. Its further suggestion that we adopt standards to require that cablecasters coordinate educational and public service programming with affected educational organizations is, we believe, unnecessary in the absence of further experience with the new medium. We have no reason to think that educational organizations will not be consulted or, on another aspect of this general question, that commercial continuity will be inappropriately used in connection with educational programs. Every conceivable problem, even if of potential importance, cannot be dealt with in advance of some experience indicating its substantiality and the best approach to it.

for the presentation of a CATV origination which does not constitute the distribution of its newspaper.[9]

9. Accordingly, upon the authority of Sections 2, 3, 4(i) and (j), 301, 303, 307, 308 and 309 of the Communications Act, the rules set forth in Appendix A hereto *Are adopted*, effective August 14, 1970, and

It is further ordered, That the petitions for reconsideration are in all other respects *Denied*.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

APPENDIX A

I. Section 74.1111(a) is revised to read:

§ 74.1111 *Cablecasting in conjunction with carriage of broadcast signals.*

(a) Effective on and after April 1, 1971, no CATV system having 3,500 or more subscribers shall carry the signal of any television broadcast station unless the system also operates to a signficant extent as a local outlet by cablecasting and has available facilities for local production and presentation of programs other than automated services; *Provided, further*, That the system shall not enter into any contract, arrangement or lease for use of its cablecasting facilities which prevents or inhibits the use of such facilities for a substantial portion of time (including the time period 6:00–11:00 p.m.), for local programming designed to inform the public on controversial issues of public importance.

* * * * * * *

II. A new Section 74.1116 is added to read as follows:

§ 74.1116 *Lotteries.*

(a) No CATV system when engaged in cablecasting shall transmit or permit to be transmitted on the cablecasting channel or channels any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes.

(b) The determination whether a particular program comes within the provisions of paragraph (a) of this section depends on the facts of each case. However, the Commission will in any event consider that a program comes within the provisions of paragraph (a) of this section if in connection with such program a prize consisting of money or thing of value is awarded to any person whose selection is dependent in whole or in part upon lot or chance, if as a condition of winning or competing for such prize, such winner or winners are required to furnish any money or thing of value or are required to have in their possession any product sold, manufactured, furnished or distributed by a sponsor of a program broadcast on the station in question.

III. A new Section 74.1121 is added to read as follows:

§ 74.1121 *General operating requirements.*

(a) Cablecasting operations for which a per-program or per-channel charge is made shall comply with the following requirements:

(1) Feature films shall not be cablecast which have had general release in theaters anywhere in the United States more than 2 years prior to their cablecast: *Provided, however*, That during one week of each calendar month one feature film the general release of which occurred more than ten years previously may be cablecast, and more than a single showing of such a film may be made during that

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[9] We note, of course, that our First Report and Order did not deal with common carrier services provided by a CATV. This subject calls for further independent study. We also note that the rules adopted in the First Report and Order, as they state, apply to programs originated by others than the CATV operator, when presented on the channel or channels controlled by the CATV operator.

week: *Provided, further,* That feature films the general release of which occurred between two and ten years before proposed cablecast may be cablecast upon a convincing showing to the Commission that a bona fide attempt has been made to sell the films for conventional television broadcasting and that they have been refused, or that the owner of the broadcast rights to the films will not permit them to be televised on conventional television because he has been unable to work out satisfactory arrangements concerning editing for presentation thereon, or perhaps because he intends never to show them on conventional television since to do so might impair their repetitive box office potential in the future.

Note: As used in this subparagraph, "general release" means the first-run showing of a feature film in a theater or theaters in an area; on a nonreserved-seat basis, with continuous performances. For first-run showing of feature films on a nonreserved-seat basis which are not considered to be "general release" for purposes of this subparagraph, see note 56 in the Fourth Report and Order in Docket No. 11279, 15 FCC 2d 466.

(2) Sports events shall not be cablecast which have been televised live on a nonsubscription, regular basis in the community during the two years preceding their proposed cablecast: *Provided, however,* That if the last regular occurrence of a specific event (e.g., summer Olympic games) was more than two years before proposed showing on CATV in a community, and the event was at that time televised on conventional television in that community, it shall not be cablecast.

Note 1: In determining whether a sports event has been televised in a community on a nonsubscription basis, only commercial television broadcast stations which place a Grade A contour over the entire community will be considered. Such stations need not necessarily be licensed to serve that community.

Note 2: The manner in which this subparagraph will be administered and in which "sports," "sports events," and "televised live on a nonsubscription regular basis" will be construed is explained in paragraphs 288–305 of the Fourth Report and Order in Docket No. 11279, 15 FCC 2d 466.

(3) No series type of program with interconnected plot or substantially the same cast of principal characters shall be cablecast.

(4) Not more than 90 percent of the total cablecast programming hours shall consist of feature films and sports events combined. The percentage calculations may be made on a yearly basis, but, absent a showing of good cause, the percentage of such programming hours may not exceed 95 percent of the total cablecast programming hours in any calendar month.

(5) No commercial advertising announcements shall be carried on such channels during such operations except, before and after such programs, for promotion of other programs for which a per-program or per-channel charge is made.

STATEMENT OF COMMISSIONER ROBERT T. BARTLEY CONCURRING IN PART AND DISSENTING IN PART

I concur in denying reconsideration of the First Report and Order's provisions for program origination, advertising, and applicability of Sections 315 and 317 of the Communications Act. However, I would apply the program origination requirement to systems with over 7,500 subscribers instead of 3,500.

I dissent to adoption of Section 74.1121, with its restrictions on programming provided at special fees, which amounts to complete strangulation of a potentially new economic base for program orgination.

SEPARATE OPINION OF COMMISSIONER NICHOLAS JOHNSON CONCURRING IN PART, DISSENTING IN PART

I concur with the Commission majority's denial of the petitions for reconsideration of our action in the First Report and Order of this docket. However, I dissent to the restrictions placed on the program-

ming to be originated by cable systems. The majority treats "pay" channels on cable systems in an identical fashion to over-the-air subscription television stations. Similar restrictions are placed on both.

In my opinion, the future of cable television lies in the efforts to originate new and unique programming—aimed at local communities, ethnic groups, and minority tastes of all kinds. Distant signals, automated services, and all the technical gimmicks promised by cable are secondary to the providing of greater diversity in programming. Cable systems have much to learn about origination; the owners, and those who program over their facilities on a leased basis, should be free to experiment with different forms of financing programming. Therefore, I would not place restrictions on this emerging industry at this time. If problems similar to those some feel are posed by over-the-air subscription television appear in cable television at some future time, I will be ready to take action then. But for now, I would prefer to let the industry develop independent of such arbitrary government controls as these.

APPENDIX E

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 74, SUBPART K, OF THE COMMISSION'S RULES AND REGULATIONS RELATIVE TO COMMUNITY ANTENNA TELEVISION SYSTEMS; AND INQUIRY INTO THE DEVELOPMENT OF COMMUNICATIONS TECHNOLOGY AND SERVICES TO FORMULATE REGULATORY POLICY AND RULEMAKING AND/OR LEGISLATIVE PROPOSALS	Docket No. 18397

MEMORANDUM OPINION AND ORDER

(Adopted January 21, 1971; Released January 25, 1971)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING; COMMISSIONER HOUSER NOT PARTICIPATING.

1. In the *First Report and Order in Docket No. 18397*, FCC 69-1170, 20 FCC 2d 201, the Commission adopted Section 74.1111 of the Commission's Rules which required that CATV systems having 3,500 or more subscribers engage in cablecasting beginning January 1, 1971.[1] Subsequently, the Commission acted upon petitions for reconsideration of this action in its *Memorandum Opinion and Order in Docket No. 18397*, FCC 70-677, 23 FCC 2d 825, in which, *inter alia*, it extended the effective date of Section 74.1111 of the Rules to April 1, 1971. On July 28, 1970, Midwest Video Corporation, operator of various CATV systems, filed with the United States Court of Appeals for the Eighth Circuit a petition for review of the rules adopted in Docket No. 18397. And on December 15, 1970, Midwest filed with the Commission a "Motion for Stay" of the effective date of Section 74.1111(a) of the Rules.

2. In support of its motion, Midwest argues that: (a) there is a likelihood that it will prevail on the merits of its appeal since the Commission's actions go beyond the Commission's jurisdiction as recognized in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157

[1] Section 74.1111 of the Rules provided that,

§ 74.1111 *Cablecasting in conjunction with carriage of broadcast signals.*

(a) Effective on and after January 1, 1971, no CATV system having 3,500 or more subscribers shall carry the signal of any television broadcast station unless the system also operates to a significant extent as a local outlet by cablecasting and has available facilities for local production and presentation of programs other than automated services.

(b) No CATV system shall carry the signal of any television broadcast station if the system engages in cablecasting, either voluntarily or pursuant to paragraph (a) of this section, unless such cablecasting is conducted in accordance with the provisions of §§ 74.1113, 74.1115, 74.1117 and 74.1119.

(1968), and are otherwise open to challenge; (b) that, as an operator of a number of CATV systems with more than 3,500 subscribers, it will suffer irreparable injury if the stay is not granted since its choices would be between cessation of operation and commencement of a costly service which it could not later withdraw; and (c) that there would be no injury to the public or other parties if the Commission grants the requested stay.

3. We rule on Midwest's arguments as follows: (a) the Commission's cited actions adequately detail its reasons for determining that adoption of Section 74.1111(a) of the Rules serves the public interest as well as its grounds for believing it has authority to adopt this rule; (b) this argument is framed in generalities and there has been no showing made to support the view that compliance with Section 74.1111(a) of the Rules would be an unsustainable burden. In this regard, however, we note that both the California Community Television Association and the National Cable Television Association, Inc., have requested that we inaugurate rule making to increase the minimum subscriber number from 3,500 to 10,000. In support, they submit a study dated December 7, 1970 by Comanor and Mitchell of Stanford University on *The Economic Consequences of the Proposed FCC Regulations on the CATV Industry*.[2] This study seems to indicate that CATV systems of 10,000 (ultimate) subscribers, assuming all the costs they would have to bear under the commercial substitution plan (i.e. copyright fee, public TV fee, program organization, etc.), would operate at a loss at least during the first four years after starting operation.[3] In these projections, the capital equipment cost for program organization was taken at the $38,000 level and the annual operating cost for program origination was estimated to be $43,000. And such costs are appreciably higher than first projected for cablecasting. E.g., 20 FCC 2d 201, 210. While we do not consider that an adequate showing has been made to justify general change, we see no public benefit in risking injury to CATV systems in providing local origination. Accordingly, if CATV operators with fewer than 10,000 subscribers request *ad hoc* waiver of Section 74.1111(a) of the Rules, they will not be required to originate pending action on their waiver requests. Compare *Tehachapi TV Cable Co.*, FCC 67-67, 6 FCC 2d 469. Systems of more than 10,000 subscribers may also request waivers, but they will not be excused from compliance unless the Commission grants a requested waiver; (c) the cited actions in Docket No. 18397 explain the Commission's reasons for requiring cablecasting on larger CATV systems as a benefit to the public. This benefit to the public would be delayed if the requested stay is granted, and the stay would, therefore, do injury to the public's interest.

4. Waiver requests must contain sufficient information for the Commission to judge the net effect of program origination cost on the

[2] Filed as Attachment A to the NCTA comments in Docket 18397-A.

[3] Comanor and Mitchell study, Appendix I, Run O-100.3, table 5; Comanor and Mitchell study, Appendix I, Run O-100.2, table 5; Comanor and Mitchell study, Appendix J, Run N-100.1, table 5; Comanor and Mitchell study, Appendix J, Run N- table 5; Comanor and Mitchell study, Appendix J, Run N-100.2B, table 5; Comanor and Mitchell study, Appendix J, Run N-100.3B, table 5.

ability of the CATV system to serve its subscribers. This must include at least (a) complete financial operating statements for each of the last 3 years including separate cost entries for all major expenses (such as depreciation, labor, interest, taxes, etc.) and identification of the amount included as expenses but paid to principals, (b) a description of the depreciation periods and computation method, (c) a company balance sheet as of the beginning of the 3-year period and as of the end of each of the 3 years, (d) average number of subscribers connected to the system and homes passed by the system during each of the last three years, (e) plans for future expansion of the cable miles in the franchised area, and (f) estimated capital and operating costs for program origination. The waiver request should also include any other data which appears to be relevant, but the financial showing will be heavily relied upon in determining whether the waiver application will be granted.

In view of the foregoing, the Commission has concluded that a grant of Midwest Video Corporation's "Motion for Stay" would not be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Motion for Stay" filed December 15, 1970, by Midwest Video Corporation in this proceeding IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX F

Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151 et seq.

SEC. 1. For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication,[1] and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

SEC. 2. (a) The provisions of this Act shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which orig-

[1] The provisions relating to the promotion of safety of life and property was added by "An Act to amend the Communications Act of 1934, etc." Public No. 97, 75th Congress, approved and effective May 20, 1937, 50 Stat. 189.

inates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone.[2]

SEC. 3. For the purposes of this Act, unless the context otherwise requires—

(a) "Wire communication" or "communication by wire" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

(b) "Radio communication" or "communication by radio" means the transmission by radio or writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

* * * * * *

(d) "Transmission of energy by radio" or "radio transmission of energy" includes both

[2] The words "the Philippine Islands or" preceding "the Canal Zone" are omitted on authority of Proc. No. 2695, effective July 4, 1946, 11 Fed. Reg. 7517, 60 Stat. 1352, recognizing the independence of the Philippine Islands.

such transmission and all instrumentalities, facilities, and services incidental to such transmission.

* * * * *

SEC. 4(i). The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

* * * * *

SEC. 301. It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or district; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders

of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

* * * * * *

SEC. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall—

* * * * * *

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

* * * * * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

* * * * * *

SEC. 307(b). In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

SUBPART K—COMMUNITY ANTENNA TELEVISION SYSTEMS

* * * * * * *

§ 74.1101 Definitions

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(j) *Cablecasting.* The term "cablecasting" means programing distributed on a CATV system which has been originated by the CATV operator or by another entity, exclusive of broadcast signals carried on the system.

* * * * * * *

§ 74.1111 Cablecasting in conjunction with carriage of broadcasting signals.

(a) Effective on and after April 1, 1971, no CATV system having 3,500 or more subscribers shall carry the signal of any television broadcast station unless the system also operates to a significant extent as a local outlet by cablecasting and has available facilities for local production and presentation of programs other than automated services: *Provided, further,* That the system shall not enter into any contract, arrangement or lease for use of its cablecasting facilities which prevents or inhibits the use of such facilities for a substantial portion of time (including the time period 6–11 p.m.), for local programing designed to inform the public on controversial issues of public importance.

(b) No CATV system shall carry the signal of any television broadcast station if the system engages in cablecasting, either voluntarily or pursuant to paragraph (a) of this section, unless such cablecasting is conducted in accordance with the provisions of §§ 74.1113, 74.1115, 74.1117, and 74.1119.

74.1111 suspended

[*§ 74.1111 suspended; III (68)–14*]

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